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No. _____

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.
D/B/A TIME WARNER CABLE,
Petitioner,

v.

NATIONAL SATELLITE SPORTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under federal principles of collateral estoppel, a district court holding, though otherwise entitled to collateral-estoppel effect, should be denied such effect if it was one of two or more alternative, independently sufficient, holdings.

2. Whether a company holding a contractual right to exhibit particular satellite-delivered television programming in commercial establishments has standing to bring an action under a federal communications-piracy statute, 47 U.S.C. § 605, against a cable operator that, having a contractual right to receive an entirely separate satellite feed of the same programming for retransmission to residential subscribers, inadvertently provides it to a commercial establishment.

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

Petitioner Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable was a defendant and the appellant in the proceedings below.

Respondent National Satellite Sports, Inc., was the plaintiff and the appellee in the proceedings below.

Eliadis, Inc., d/b/a Melody Lane Lounge, Gust Eliadis, and Jack McHelson were defendants in the district court but did not participate in the proceedings before the Sixth Circuit.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states as follows:

Time Warner Entertainment Company, L.P., is a Delaware limited partnership. The general partners in Time Warner Entertainment Company, L.P., each are directly or indirectly wholly owned by AOL Time Warner Inc., a publicly held company. An ownership interest of more than 10 percent in Time Warner Entertainment Company, L.P., is directly or indirectly held by AT&T Corp., a publicly held company.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Time Warner Entertainment Company, L.P. ("Time Warner"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

The court of appeals declined to give collateral-estoppel effect to one of two alternative grounds in a prior federal district court judgment between the same two parties. In so ruling, the court of appeals (as it acknowledged in its opinion) placed itself squarely in conflict with the D.C., Second, and Ninth Circuits, which have held that *each* alternative ground is a basis for estoppel. In denying preclusive effect, the Sixth Circuit sided with the Fourth, Seventh, and Tenth Circuits, which have held that *neither* alternative ground is a basis for estoppel. The Sixth Circuit purported, however, to adopt a third approach, under which a "primary" alternative ground may still be entitled to preclusive effect, but a "secondary" alternative ground is not. The decision below thus deepens a

fully developed conflict of authority. This case presents an ideal vehicle to resolve the conflict and to establish a uniform federal rule.

Review is particularly warranted because the court of appeals' refusal to accord preclusive effect to alternative holdings is incorrect and undermines the very purposes of collateral estoppel: to relieve courts and litigants of the burdens of multiple lawsuits, and to prevent inconsistent decisions on the merits (as occurred here). The arguments that have been mustered in support of denying collateral-estoppel effect to alternative holdings are unpersuasive. *First*, preclusion cannot be withheld on the theory that it is unfair to bind the losing litigant to a holding that, in the presence of an unassailable alternative holding, cannot successfully be appealed. Alternative grounds *can* be appealed, and a losing litigant has every incentive to do so. There is thus no unfairness, let alone so much as to justify the countervailing unfairness of compelling the prevailing litigant to suffer a do-over lawsuit. *Second*, preclusion cannot be withheld on the theory that district courts do not give alternative grounds careful consideration. It is settled law that alternative grounds — even "secondary" ones — are entitled to full *stare decisis* effect. If the supposed concern about careful consideration is not sufficiently strong to deny *stare decisis* effect, it cannot be strong enough to deny collateral-estoppel effect. *Finally*, the Sixth Circuit's "primary"/"secondary" approach suffers from a flaw in addition to those described above: it is so indeterminate as to be unworkable.

This Court should also grant review of a second issue wrongly decided by the court of appeals. The court of appeals held that a company holding a contractual right to exhibit particular satellite-delivered television programming in commercial establishments has standing to bring an action under a federal communications-piracy statute, 47 U.S.C.

§ 605, against a cable operator that, having a contractual right to receive an entirely separate satellite feed of the same programming for retransmission to residential subscribers, inadvertently provides it to a commercial establishment. That holding is mistaken: such a stranger to the diverted communication is not within the zone of interests protected by Section 605. The court of appeals' contrary view wrongly creates a federal forum (in which attorneys' fees, liquidated damages, and a strict liability standard are available) for disputes that previously were only of state concern. The court of appeals' erroneous decision is thus of broad significance: it not only dramatically increases cable operators' cost of doing business by creating a federal mandate of infallibility, but also threatens to burden the federal judiciary with countless disputes that properly belong in state court.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 253 F.3d 900. The opinion of the district court (Pet. App. 30a-43a) is reported at 65 F. Supp. 2d 662.

JURISDICTION

The court of appeals entered its judgment on June 11, 2001, and denied a petition for rehearing en banc on August 9, 2001 (Pet. App. 60a). On November 2, 2001, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including December 7, 2001. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 705 of the Communications Act of 1934, 47 U.S.C. § 605, is set forth at Pet. App. 69a-76a.

STATEMENT

1. On December 14, 1996, Riddick Bowe fought Andrew Golota in a championship boxing match in Atlantic City, New Jersey. The promoter of the match, Main Events, granted different parties the rights to provide a telecast to different audiences. Main Events licensed the right to provide the match to *residential* viewers to Viewer's Choice. Viewer's Choice sub-licensed its rights to cable operators around the country, including petitioner Time Warner. Main Events licensed the right to provide the match to *commercial* establishments to Entertainment by J&J, Inc., which sub-licensed respondent National Satellite Sports, Inc. ("NSS") to sell the fight to commercial establishments in certain parts of the country, including Ohio. Time Warner marketed the match to residential customers for a pay-per-view fee of $39.95. NSS marketed the match to commercial establishments for fees of $1,000 or more.

Although residential and commercial customers ordering the fight received the same programming, the electronic video signals were distinct. The signal originating in Atlantic City was split into two separate satellite feeds, one of which was transmitted to cable operators like Time Warner, which then retransmitted it over their local cable systems. *See* Pet. App. 3a. The other (commercial) satellite feed was beamed directly to commercial establishments' reception antennas (*e.g.*, the rooftop satellite dishes commonly seen on sports bars). Either way, the signals arrived at the customer's premises in scrambled format, and only paying customers were permitted to unscramble it.[1]

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[1] *See, e.g., Time Warner Cable of New York City v. Taco Rapido Restaurant*, 988 F. Supp. 107, 109 (E.D.N.Y. 1997); *Time Warner Cable of New York City v. Freedom Elecs., Inc.*, 897 F. Supp. 1454, 1456 (S.D. Fla. 1995).

Some time before the match, Time Warner began providing cable service to a bar in Massillon, Ohio, called the Melody Lane Lounge. Although Time Warner provides cable service to commercial establishments, it does not allow them to order pay-per-view programming, because the terms of its contracts with programming providers ordinarily do not permit such service. The Melody Lane Lounge's proprietor had ordered service in his own name, however, and Time Warner's records listed the account as residential. Accordingly, when a Melody Lane bartender contacted Time Warner to order the pay-per-view match, Time Warner allowed the event to be descrambled and exhibited. *See id.* at 4a.

When NSS found out, it sued Time Warner in the United States District Court for the Northern District of Ohio. Although the crux of NSS's complaint was that Time Warner went beyond the scope of the contract with its programming supplier when it provided the programming to the Melody Lane Lounge, NSS did not bring a state-court contract action (say, as a third-party beneficiary of the contract between Time Warner and Viewer's Choice or directly against Entertainment by J&J or Main Events). Instead, NSS sued Time Warner in federal district court, claiming that the exhibition of the fight in the Melody Lane Lounge violated a federal statute, 47 U.S.C. § 605(a).

The relevant part of Section 605(a) — its first sentence — provides: "[N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, . . . to any person other than the addressee." *Id.* Under the statute, suit may be brought in federal district court by "[a]ny person aggrieved." *Id.* § 605(e)(3)(A). The statute further provides that "the term

'any person aggrieved' shall include any person with proprietary rights in the intercepted communication." *Id.* § 605(d)(6). Finally, the statute provides that a prevailing party is entitled to statutory damages and attorneys' fees. *See id.* §§ 605(e)(3)(B)(iii), 605(e)(3)(C)(i)(II).

Time Warner defended against NSS's Section 605 claim by (among other things) pointing out that the signal that Time Warner had received and inadvertently provided to the Melody Lane Lounge was entirely separate from the satellite signal that had been provided to NSS's commercial customers. Thus, Time Warner argued, even assuming it had violated Section 605(a) by providing a cable signal to the Melody Lane Lounge beyond the limits of its contract with Viewer's Choice, NSS — as a complete stranger to the residential signal — could not claim standing as a "person aggrieved" simply because it might otherwise have sold the Melody Lane Lounge the separate commercial signal. Moreover, Time Warner argued, it had not in fact violated the first sentence of Section 605(a), as it had provided its signal "through authorized channels of transmission" to its own "addressees."

2. While the instant litigation was pending in the district court, a different judge of the same court considered a similar suit between the same parties. *See* Pet. App. 5a-6a. In that suit, too, NSS had sued Time Warner in connection with a boxing match (Evander Holyfield vs. Bobby Czyz) that Time Warner was authorized to provide to residential cable subscribers and that NSS was authorized to sell to commercial establishments. And there, too, NSS alleged that Time Warner had violated Section 605(a) by inadvertently allowing the match to be shown in a commercial establishment (a tavern in Akron, Ohio, called "Coach's Corner"). And there, again, NSS claimed standing even though Time Warner and NSS each provided separate signals to their customers. In short, although the second case involved a different boxing

match and a different bar, the parties and the issues in the litigation were identical.

The Coach's Corner case went to judgment before the Melody Lane case. *See id.* at 61a-68a. Ruling from the bench just prior to the start of trial, the Coach's Corner court held that Time Warner was entitled to summary judgment for two reasons. *See id.* at 64a ("There are two bases for the decision."). *First*, the court held that NSS's contract with the company that had sub-licensed it the right to exhibit the match denied NSS the right to sue third parties. *See id.* at 64a-66a.[2] *Second*, the court held that NSS lacked standing to sue under Section 605. *See id.* at 64a, 66a. As the court noted, "the communication at issue [which NSS claimed that Time Warner had wrongfully divulged to a bar] was the [residential] feed and not the [commercial] feed which was what . . . [NSS] had an interest in." *Id.* at 66a. "And based upon . . . those undisputed facts," the court explained, "plaintiff has failed to state a Section 605 claim as an aggrieved person." *Id.*

Although the instant case was pending at the same time, NSS declined to appeal the Coach's Corner decision. *See id.* at 6a. It accordingly became final.

3. After the Coach's Corner decision, Time Warner filed a motion for summary judgment in the instant case concerning the Melody Lane Lounge. As Time Warner explained, the Coach's Corner case involved the same parties and the same "person aggrieved" standing issue as the instant case. Accordingly, Time Warner argued, basic principles of collateral estoppel dictated that the Coach's Corner judgment be given preclusive effect. The district court, however,

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[2] NSS's contract in the Coach's Corner case was different from its contract in the Melody Lane case. The latter contract did not prohibit NSS from suing third parties.

denied Time Warner's motion, granting NSS's cross-motion for summary judgment instead. *See id.* at 30a.

According to the district court, the Coach's Corner court's holding on Section 605 was not entitled to preclusive effect because it was not "essential to the judgment." *See id.* at 37a. This was so, the district court said, because the Coach's Corner court "first concluded . . . that National Satellite had failed to state a claim because it had entered into a contract [that] specifically provided that National Satellite had no right to pursue a piracy action." *Id.* Although the court acknowledged that the Coach's Corner court "further held that . . . National Satellite had failed to state a claim under § 605," it said that "[t]his second basis for the holding was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action." *Id.*

The district court went on to reject Time Warner's standing defense. It noted that Section 605(d)(6) defines "person aggrieved" to "*include* any person with proprietary rights in the intercepted communication," and "does not state that *only* such persons are 'aggrieved' for purposes of § 605." *Id.* at 38a (internal quotation marks omitted). Thus, the court held, "[i]t stands to reason . . . that persons other than those with 'proprietary rights in the intercepted communication' may also be able to state a claim under § 605." *Id.* at 39a. Besides, the court added, "since plaintiff had the exclusive right to send the Event signal to commercial establishments, a proprietary interest of some sort on the part of plaintiff arose at the moment when defendant transmitted the Event to Melody Lane Lounge." *Id.* at 39a n.5.

On the merits, the district court held that "[t]here can . . . be a violation of § 605(a) in the context of a cable television communication even if the violator receives a communication signal that it is legally entitled to receive, if it then diverts or sends the communication to an entity that is not entitled to the

communication." *Id.* at 39a-40a. In particular, the court held, Time Warner "transmitted the Event to Melody Lane Lounge through an unauthorized channel of transmission (defendant was not authorized to transmit the Event to commercial establishments)." *Id.* at 41a. Although only 23 patrons had been present in the Melody Lane Lounge during the match, *see id.* at 4a, 48a, and although the Melody Lane Lounge would not have ordered the match at the applicable commercial pay-per-view rate of roughly $1,000, *see id.* at 4a, 49a, the court awarded NSS $4,500 in damages and more than $26,000 in attorneys' fees and costs, *see id.* at 5a, 28a-29a, 53a, 58a.

4. The court of appeals affirmed. Although it found each of the other prerequisites for collateral estoppel satisfied, the court agreed with the district court that the Coach's Corner court's Section 605 holding was not "necessary to the outcome." *Id.* at 13a. The court acknowledged that a number of courts of appeals have held that "a plaintiff is precluded from relitigating an issue actually decided against it in a prior case, even if the court in the prior case rested its judgment on alternative grounds." *Id.* at 11a (internal quotation marks omitted) (citing *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987); *In re Westgate-California Corp.*, 642 F.2d 1174, 1176 (9th Cir. 1981); and *Yamaha Corp. of Am. v. United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993)). According to the court, however, this view was "counterbalanced by courts and commentaries that have adopted the opposite conclusion" — namely, that, "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue

standing alone." *Id.* at 11a-12a (internal quotation marks omitted) (citing *Arab African Int'l Bank v. Epstein*, 958 F.2d 532, 535 (3d Cir. 1992); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993-94 (4th Cir.), *cert. denied*, 484 U.S. 913 (1987); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir. 1997) (en banc); *Baker Elec. Coop. v. Chaske*, 28 F.3d 1466, 1475-76 (8th Cir. 1994); and *Turney v. O'Toole*, 898 F.2d 1470, 1472 n.1 (10th Cir. 1990)).

In the court of appeals' view, the issue was "a close one given the policy implications involved." *Id.* at 12a. On the one hand, the court observed, failure to give preclusive effect would leave a party "free to relitigate" an issue on which it had already met with defeat — a result that would directly contradict basic principles of finality and fairness. *Id.* On the other hand, the court said, affording preclusive effect to alternative holdings might be unfair to the losing litigant in that the precluded party might be deprived of a practical opportunity to appeal. *See id.* This was so, according to the court, because, if one of the district court's alternative holdings was clearly correct, appealing the other might be pointless. *See id.* at 12a-13a. In the end, the court stated without further elaboration that the latter consideration outweighed the former. *See id.*

Having thus concluded that it should deny preclusive effect, the court of appeals nevertheless purported not to "find it necessary to fully resolve this issue at the present time." *Id.* at 13a. This was so, the court said, because the Coach's Corner ruling on Section 605 was "overshadowed" by what the court described as the more extensive discussion "outlining the contractual obstacles that prevented NSS from suing Time Warner." *Id.* Believing that the relative prominence of the contractual holding should make a difference, the court purported to formulate a new test, describing its holding as follows: "where, as in *Coach's Corner*, one ground for the

decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion." *Id.*

The court of appeals next rejected Time Warner's Section 605 standing objection, substantially agreeing with the district court's reasoning. *See id.* at 15a-21a. Thus, the court stated that the "explicit reference to a subset of persons aggrieved" following the word "include" in Section 605(d)(6) "was not intended to exclude others who sustain injuries from a violation of any of the prohibitions originally listed in § 605(a)." *Id.* at 18a-19a. In addition, the court pointed to legislative history that, it said, supported the view that, in adding the definition of "person aggrieved" to the statute in 1988, Congress sought to expand, not contract, statutory standing. *See id.* at 16a-19a. From that, the court without more concluded that the district court "did not err in determining that NSS had standing to sue Time Warner under § 605." *Id.* at 21a.

The court of appeals further agreed with the district court that the first sentence of Section 605(a) is violated when a cable operator makes programming available to subscribers who, under the agreement between the cable operator and its programming supplier, are not supposed to receive it. In the court's view, whether the Melody Lane Lounge was a "person other than the addressee" for purposes of Section 605(a) turned on the intent of the programming supplier — not the intent of the cable operator. *See id.* at 27a ("the first sentence of § 605(a) . . . looks at the relationship between the original sender and the ultimate receiver in determining whether the communication is authorized"). The court acknowledged that the practical effect of its holding was "a federal mandate of infallibility on the part of cable operators," *id.*, but was not troubled by that conclusion. According to the court, "Congress enacted the Communications Act and the

subsequent amendments thereto to protect the integrity of electronic communications from negligent as well as willful divulgences by intermediaries." *Id.*

Time Warner filed a timely petition for rehearing en banc, which the court of appeals denied. *See id.* at 60a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS REQUIRED TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING THE PRECLUSIVE EFFECT OF A DISTRICT COURT JUDGMENT RESTING ON ALTERNATIVE GROUNDS.

A. As the Sixth Circuit expressly acknowledged, *see* Pet. App. 11a-12a, the courts of appeals disagree whether a determination in a federal district court's decision is entitled to preclusive effect if it is one of two or more alternative grounds that are independently sufficient to support the judgment. The D.C., Second, and Ninth Circuits have embraced a rule under which, "if a court decides a case on two grounds, *each* is a good estoppel." *Irving Nat'l Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926) (L. Hand, J.) (emphasis added).[3] In declining to accord preclusive effect to the Coach's Corner court's Section 605 holding, the Sixth Circuit sided with the Fourth, Fifth, Seventh, and Tenth Circuits, under whose

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[3] *See Yamaha*, 961 F.2d at 255; *Bank of Guam v. Wiseman*, No. 87-1799, 1990 WL 140521, at *2 (9th Cir. Sept. 27, 1990) (judgment noted at 914 F.2d 1496 (table)); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986), *cert. denied*, 480 U.S. 948 (1987); *Westgate-California*, 642 F.2d at 1176-77; *Williams*, 556 F.2d at 1154. The court of appeals correctly noted that the Seventh Circuit at one point adopted this view. *See* Pet. App. 12a (citing *Magnus Elecs.*, 830 F.2d at 1402); *see also Schellong v. INS*, 805 F.2d 655, 658-59 (7th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987). In a later en banc decision, however, the Seventh Circuit switched sides in the debate, without citing its prior decisions. *See Peabody Coal*, 117 F.3d at 1008.

approach neither alternative holding is afforded preclusive effect.[4] Commentators are likewise in disagreement.[5]

The outcome in this case plainly hinges on the resolution of the conflict. As the Coach's Corner court stated and the court of appeals acknowledged, the Coach's Corner decision rested on two alternative grounds that could each have borne the result alone. *See* Pet. App. 64a ("There are two bases for the decision."); *id.* at 8a ("[T]he court held that NSS had failed

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[4] *See Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698, 704 (4th Cir. 1999) (per curiam), *cert. dismissed*, 529 U.S. 1050 (2000); *Peabody Coal*, 117 F.3d at 1008; *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996) (en banc), *cert. denied*, 519 U.S. 1090 (1997); *Turney*, 898 F.2d at 1472 n.1; *Ritter*, 814 F.2d at 993; *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1168-70 (5th Cir. Unit A Dec. 1981). The court below also pointed to decisions of the Third and Eighth Circuits, but those decisions by their terms applied state law. *See Arab African Int'l Bank*, 958 F.2d at 535; *Baker Elec. Coop.*, 28 F.3d at 1475-76.

[5] *Compare, e.g.*, *Restatement (Second) of Judgments* § 27 cmt. i (1982) ("If a judgment . . . is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.") *with, e.g.*, Jo Desha Lucas, *The Direct and Collateral Estoppel Effects of Alternative Holdings*, 50 U. Chi. L. Rev. 701, 729 (1983) ("Lucas") (taking contrary view); *Restatement of Judgments* § 68 cmt. n (1942) ("Where the judgment is based upon the matters litigated as alternative grounds, the judgment is determinative on both grounds, although either alone would have been sufficient to support the judgment. . . . [I]t must be said either that both are material to the judgment or that neither is material. It seems obvious that it should not be held that neither is material, and hence both should be held to be material."); Austin Wakeman Scott, *Collateral Estoppel By Judgment*, 56 Harv. L. Rev. 1, 11 (1942) ("It seems obviously fairer to hold that the judgment is conclusive as to both grounds rather than that it is conclusive as to neither."). The two leading civil-procedure treatises have noted the conflict but have declined to take a position on it. *See* 18 *Moore's Federal Practice* § 132.03[4][b][i]-[iv] (3d ed. 2001); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4421, at 208 (1981) ("Wright & Miller").

to state a claim under *both* the contracts at issue in that case *and* under 47 U.S.C. § 605."). As the court of appeals further recognized, the Section 605 issue resolved in the Coach's Corner decision is identical to the Section 605 issue raised in the instant case. *See id.* at 10a-11a. It follows that the Section 605 holding in the Coach's Corner decision would have been accorded preclusive effect in the D.C., Second, and Ninth Circuits. In the Sixth Circuit, it was not.

The conflict is no less implicated because the court of appeals said that it "d[id] not find it necessary to fully resolve" the issue before it by definitively choosing sides in the conflict. *Id.* at 13a. If anything, the Sixth Circuit exacerbated the discord among the circuits by purporting to adopt a third approach under which only "secondary" alternative holdings are denied preclusive effect. Thus, the instant case presents this Court with an ideal vehicle for resolving the conflict: it brings before the Court all three approaches in the debate.

It is equally clear that the conflict, which is fully mature, should not be permitted to fester. On numerous occasions, this Court has granted certiorari to resolve conflicts of authority concerning issues of res judicata and collateral estoppel.[6] Those doctrines are not mere rules of procedure as to which disagreement is harmless so long as knowledgeable litigants can adjust their conduct to accommodate different approaches. Rather, these doctrines unalterably determine when relitigation is permitted. If these rules differ among the circuits, substantively different outcomes will result. Indeed, the existing conflict encourages forum shopping by litigants seeking to take advantage of the most hospitable preclusion rules. Only this Court can end that state of affairs.

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[6] *See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980); *Standefer v. United States*, 447 U.S. 10 (1980); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Blonder-Tongue Labs., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971).

B. Review is particularly appropriate because the court of appeals' refusal to accord preclusive effect to alternative holdings is not only contrary to the decisions of numerous other circuits but also incorrect. As this Court has explained, the doctrine of issue preclusion "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana v. United States*, 440 U.S. 147, 153 (1979). The doctrine "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." *Allen*, 449 U.S. at 94. Those interests in fairness and efficiency are no less implicated where a judgment rests on alternative grounds. To the contrary, a litigant whose claim is rejected on two grounds should have no greater entitlement to a second bite at the apple than a litigant whose claim was rejected on only one ground.

To the extent that they have sought to explain why alternative holdings should be afforded less preclusive effect than holdings standing alone, proponents have relied on two arguments.[7] *First*, these proponents (including the court below) have argued that preclusion would be unfair to losing litigants, on the theory that such litigants have no realistic opportunity to appeal. If one of the alternative holdings is so strong as to be unassailable, the theory runs, appeal of the other is futile. *Second*, proponents have argued that an alternative ground may not be as well-considered as a single

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[7] *See Hicks*, 662 F.2d at 1168-70; *Restatement (Second) of Judgments* § 27 cmt. i. It is noteworthy that both *Hicks* and the *Restatement (Second)* relied heavily on a Second Circuit decision — *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970) — that the Second Circuit itself later expressly repudiated. *See generally* Lucas at 729 (describing the "star-crossed love affair between the Restatement (Second) and *Halpern*").

ground determining the outcome by itself. On this reasoning, an alternative ground is akin to *dictum*.[8]

Neither argument is persuasive. *First*, there is no merit to the suggestion that losing litigants have no incentive to appeal. It is true that, if one of the alternative grounds is unassailable, an appellant is unlikely to obtain a reversal. But a court of appeals' affirmance on only one alternative ground deprives the un-affirmed ground of collateral-estoppel effect. *See Restatement (Second) of Judgments* § 27 cmt. o; Lucas at 706 n.29. Thus, a losing litigant faced with alternative holdings does have an incentive to appeal, and preclusion is not unfair — let alone so unfair as justifying the countervailing unfairness of burdening the prevailing litigant with an entirely new suit.[9] It is no answer to say that appeals taken for the purpose of inducing a one-ground-only affirmance waste judicial resources. *See Hicks*, 662 F.2d at 1169. Even in the rare case in which an appellant has no hope at all of prevailing on each ground, the expense in terms of judicial economy is markedly lower than that incurred when the same litigant is allowed to relitigate from scratch. *See* Lucas at 713-14.

More fundamentally, even if the losing litigant had no incentive to appeal, preclusive effect should not be denied. This Court has disclaimed the "suggest[ion] that the availability of appellate review is always an essential predicate of estoppel." *Standefer*, 447 U.S. at 23 n.18. Surely, an incentive (as distinguished from the ability) to appeal is even less essential. *See Pinkney v. Keane*, 920 F.2d 1090, 1096 (2d Cir. 1990) ("[W]hile lack of incentive to litigate vigorously may render the collateral estoppel doctrine inoperative, lack

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[8] It is well-established that *dictum* is not entitled to preclusive effect. *See, e.g.*, Wright & Miller at 194.

[9] Besides, it is difficult to see why judicial sympathy is due to a party who litigated to a conclusion a claim that was apparently so meritless that it stands no chance of being revived on appeal.

of incentive to appeal does not have the same effect. Rather, failure to appeal an adverse judgment negates the preclusive effect of that judgment only when review was unobtainable as a matter of law. Where review is available but is not sought, estoppel applies.") (footnote, citations, and internal quotation marks omitted), *cert. denied*, 501 U.S. 1217 (1991).

Second, it cannot credibly be argued that alternative holdings should be denied collateral-estoppel effect out of concern that they do not reflect thoughtful consideration. It is well-settled that alternative holdings are entitled to full *stare decisis* effect. *See, e.g., Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924); *Natural Resources Defense Council, Inc. v. NRC*, 216 F.3d 1180, 1189 (D.C. Cir. 2000). If alternative holdings deserve *stare decisis* effect, they also deserve collateral-estoppel effect. *See* Lucas at 703.

The "no thoughtful consideration" argument is further undermined by its proponents' position on the preclusive effect of alternative holdings of appellate courts. Although they would not accord preclusive effect to alternative holdings of trial courts, they *would* accord such effect to alternative holdings of appellate courts. *See Restatement (Second) of Judgments* § 27 cmt. o. There simply is no basis for any assumption that trial courts consider their decisions less carefully than appellate courts. More generally, it is unclear why alternative holdings of appellate courts, which are subject to the same "lack of incentive to appeal" concerns as alternative holdings of trial courts, should nonetheless be accorded more powerful preclusive effect.

C. Even less persuasive is the court of appeals' attempt to find a middle road — in which a "primary" alternative ground may have preclusive effect but a "secondary" ground does not. *First*, that theory plainly cannot be grounded on the view that "secondary" holdings are more akin to *dictum* than

"primary" ones: the principle that alternative holdings are entitled to full *stare decisis* effect applies with as much force to "secondary" holdings as it does to "primary" ones. *See Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("[i]t is true that in this case the other reason was more dwelt upon and perhaps it was more fully argued and considered than section 3477, but we cannot hold that the use of the section in the opinion is not to be regarded as authority"). Plainly, whether a holding constitutes *dictum* cannot depend on the order in which grounds are presented or the amount of ink that is spilled.

Second, the court of appeals' primary/secondary distinction renders intolerably equivocal an inquiry that by its very nature should be clear and certain.[10] Even if the Sixth Circuit's rule had been established in advance, it seems unlikely that either NSS or Time Warner would have been able to predict with certainty whether the court of appeals would have found the Coach's Corner court's Section 605 holding to be so much less prominent than the contractual holding as to be unworthy of preclusive effect. Because the collateral-estoppel inquiry must be predictable if it is to fulfill its office of forestalling repetitive litigation, the court of appeals' approach must be rejected.

II. REVIEW IS FURTHER REQUIRED TO CORRECT THE COURT OF APPEALS' MISTAKEN INTERPRETATION OF SECTION 605.

The Court should also grant review in connection with the court of appeals' expansive and unprecedented construction of

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[10] "[I]t is in the interest of predictability and simplicity for the result of non-preclusion to be uniform." *Restatement (Second) of Judgments* § 27 cmt. i; *see also* Wright & Miller at 208 ("the parties should be entitled to a clear rule"); Lucas at 729 (cautioning against introducing "uncertainty where certainty is crucial").

Section 605. The court of appeals held that a company holding a contractual right to exhibit particular satellite-delivered television programming in commercial establishments has standing to bring a federal piracy action against a cable operator that, having a contractual right to receive an entirely separate satellite feed of the same programming for distribution to residential subscribers, inadvertently provides it to a commercial establishment. That erroneous interpretation creates a federal forum (in which attorneys' fees, liquidated damages, and a strict liability standard are available) for disputes that previously were only of state concern. Moreover, this reading is at odds with the statute's language and purpose and will have troubling consequences for the entire cable industry. It therefore independently warrants review.[11]

A. The proscription now contained in the first sentence of Section 605(a) was first enacted as part of the Radio Act of 1912. It was intended to strike at a serious problem affecting electronic communications at the time: telegraph workers would sometimes divulge to unauthorized third parties sensitive information passing through their hands.[12] Insofar as

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[11] Besides being certworthy in its own right, this second question may aid the Court in adjudicating the first question. Although petitioner believes that the court of appeals' approach to collateral estoppel — under which preclusive effect hinges on a holding's relative "primacy" — is misguided, that approach is one of the three strands in the extant conflict. Granting review in connection with this second question will permit this Court to assess the court of appeals' approach in a concrete legal setting: it may help the Court in determining whether the court of appeals was correct in labeling the Section 605 ground as being merely secondary and, if so, what consequences should flow from that label.

[12] *See* H.R. Rep. No. 582, 62d Cong., 2d Sess. 5 (1912); *Home Box Office, Inc. v. Advanced Consumer Tech.*, 549 F. Supp. 14, 18 (S.D.N.Y. 1981); Kent R. Middleton, *Radio Piracy Under Section 705(a): An Unconstitutional Oxymoron*, 9 Admin. L.J. Am. U. 583, 591 & n.26 (1995) ("Middleton"); Lauritz S. Helland, *Section 705(a) in the Modern*

telegraphy by wire was involved, the problem had long been addressed by state-law measures. *See* Middleton at 592. When Congress took regulatory control of the new radio medium in 1912, it enacted an analogous ban for telegraphic transmissions by radio.[13]

With the later enactment of the Radio Act of 1927, Congress added the second, third, and fourth sentences to Section 605(a). Those sentences (which are not directly at issue in this case) were aimed at a different, but related, problem: they made unlawful the interception of radio messages by persons other than their intended recipients. *See Advanced Consumer Tech.*, 549 F. Supp. at 18-19. Although these provisions were intended primarily to safeguard the privacy of point-to-point radio communications, they have continuing significance: in recent decades, they have been invoked by providers of video programming seeking to combat unauthorized interception of their satellite signals. *See, e.g., Entertainment & Sports Programming Network, Inc. v. Edinburg Community Hotel, Inc.*, 735 F. Supp. 1334, 1338 (S.D. Tex. 1986); *American Television & Communications Corp. v. Floken, Ltd.*, 629 F. Supp. 1462, 1470 (M.D. Fla. 1986).

As originally enacted, Section 605 did not contain a provision expressly creating a private right of action. Courts,

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Communications World: A Response to Di Geronimo, 40 Fed. Comm. L.J. 115, 115-16 (1988) ("Helland").

[13] As enacted in 1912, the statute provided: "No person or persons engaged in or having knowledge of the operation of any station or stations shall divulge or publish the contents of any messages transmitted or received by such station, except to the person or persons to whom the same may be directed, or their authorized agent, or to another station employed to forward such message to its destination, unless legally required so to do by the court of competent jurisdiction or other competent authority." Ch. 287, § 4, reg. 19, 37 Stat. 302, 307.

however, found such a right of action implied. *See, e.g., Chartwell Communications Group v. Westbrook*, 637 F.2d 459, 466 (6th Cir. 1980) (collecting cases); *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947) (L. Hand, J.). Congress added a statutory provision that codified existing law in 1984. That provision, Section 605(e)(3)(A), provides that "[a]ny person aggrieved by any violation of subsection (a) . . . may bring a civil action in a United States district court." 47 U.S.C. § 605(e)(3)(A). It applies to each of the four sentences of Section 605(a).[14]

B. The wording of Section 605(e)(3)(A) is similar to that of many other federal statutes using "person aggrieved" language. *See, e.g.*, 5 U.S.C. § 702 (Administrative Procedure Act ("APA")); 28 U.S.C. § 2344 (Hobbs Act); 47 U.S.C. § 402(b)(6) (Communications Act). In interpreting such statutes, this Court has invariably recognized certain important standing limitations. One such limitation is that "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *see Bennett v. Spear*, 520 U.S.

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[14] In 1988, Congress added a new Section 605(d)(6) providing that "the term 'any person aggrieved' shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming." 47 U.S.C. § 605(d)(6). Before the amendment, a district court had held that cable operators lacked standing to sue firms that, by selling satellite-dish equipment, aided in the interception — in violation of Section 605(a)'s second and third sentences — of satellite signals bound for cable operators. *See Air Capital Cablevision, Inc. v. Starlink Communications Group, Inc.*, 601 F. Supp. 1568, 1571-72 (D. Kan. 1985). The amendment overruled that decision. *See Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 881 F.2d 983, 986 (1989), *opinion vacated and appeal dismissed*, 895 F.2d 711 (11th Cir. 1990).

154, 175 (1997); *Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 394-403 (1987).

The "zone of interests" limitation ensures that litigants are not permitted to subvert a statute's purposes by enlisting it to advance interests other than those that Congress sought to promote. As the Court explained in *Lujan*: "[F]or example, the failure of an agency to comply with a statutory provision requiring 'on the record' hearings would assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings, and not those of the reporters, that company would not be 'adversely affected within the meaning' of the statute." 497 U.S. at 883; *see also Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 525-26 (1991) (postal workers lacked standing to enforce postal monopoly statutes because "congressional concern was not with opportunities for postal workers but with the receipt of necessary revenues for the Postal Service").

Although this Court first "applied the zone-of-interests test to suits under the APA, . . . later cases have applied it also in suits not involving review of federal administrative action, and have specifically listed it among other prudential standing requirements of general application." *Bennett*, 520 U.S. at 163 (citations omitted). Indeed, because "Congress legislates against the background of [the zone of interests] doctrine," that doctrine "applies unless it is expressly negated." *Id.* Accordingly, lower courts have recognized that standing under Section 605(e)(3)(A) is likewise subject to a "zone of interests" limitation. *See, e.g., Sioux Falls Cable Television v. South Dakota*, 838 F.2d 249, 251-52 (8th Cir. 1988); *Showtime/The Movie Channel, Inc. v. Covered Bridge Condo. Ass'n, Inc.*, 693 F. Supp. 1080, 1083 (S.D. Fla. 1988), *aff'd in part, appeal dismissed in part on other grounds*, 881 F.2d

983 (1989), *opinion vacated and appeal dismissed*, 895 F.2d 711 (11th Cir. 1990); *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 650 F. Supp. 838, 842-44 (D. Mass. 1986); *Floken*, 629 F. Supp. at 1471-72.[15]

C. Given the background of Section 605, *see supra*, pp. 19-20, it is plain that Congress's purpose in enacting the first sentence of Section 605(a) was to safeguard the privacy and integrity of electronic communications.[16] Thus, standing is appropriate only for parties with a reasonable expectation to that effect. For example, in the telegraph context, standing plainly was appropriate for telegraph companies and for senders and addressees of telegrams — but not for strangers to the diverted communications (say, persons whose names happen to be mentioned in the diverted communications). Similarly, in the context of satellite signals, proper plaintiffs include satellite common carriers,[17] programming producers that act as the programming's senders,[18] and cable operators

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[15] Indeed, in its court of appeals brief, NSS conceded that, to have standing, it needed to show that it sought protection of a claim "within the zone of interests sought to be protected" by Section 605(a). Brief of Appellee National Satellite Sports, Inc. at 27, *National Satellite Sports, Inc. v. Eliadis, Inc., et al.*, Nos. 00-3013 & 00-3437 (6th Cir. filed July 24, 2000); *see id.* at 25.

[16] *See, e.g., Goldman v. United States*, 316 U.S. 129, 133 (1942) ("The protection intended and afforded by the statute is of the means of communication and not of the secrecy of the conversation."); *Reitmeister*, 162 F.2d at 694 ("[t]he interest protected by the section is the sender's"); Helland at 126 ("the statute protects the medium and not the message").

[17] *See, e.g., Edinburgh Community Hotel*, 735 F. Supp. at 1338 (satellite common carrier is the "intended beneficiar[y] of the protections of the statute, and clearly ha[s] standing to protect [its] transmissions").

[18] *See, e.g., National Football League v. Alley, Inc.*, 624 F. Supp. 6, 9-10 (S.D. Fla. 1983) ("Plaintiffs have demonstrated important economic and professional interests in the integrity of the communications system that distributes their entertainment product. Such interests are within the protective sphere of Section 605."); *Home Box Office, Inc. v. Corinth*

that are the satellite signals' addressees.[19] Again, however, Congress could not have intended that strangers to a diverted communication be within the zone of interests protected by the first sentence of Section 605(a), simply because they have some indirect economic interest in the communication's content.

The court of appeals erred, therefore, in conferring standing upon respondent NSS. NSS was neither the sender, the transmitter, nor the addressee of the diverted communication. Instead, it had exhibition rights in an entirely different and separate satellite signal that happened to carry the same television programming. Even assuming that Time Warner's inadvertent authorization of the Melody Lane Lounge to view

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Motel, Inc., 647 F. Supp. 1186, 1189 (N.D. Miss. 1986) ("Plaintiffs, HBO, ESPN, and Showtime, as senders of the satellite transmissions, are intended beneficiaries of the protection of the statute and have standing under 47 U.S.C. § 605."); *Edinburgh Community Hotel*, 735 F. Supp. at 1338 ("As senders of the subject satellite communications, HBO, ESPN and SSS are intended beneficiaries of the protections of the statute, and clearly have standing to protect their transmissions."); *National Football League v. McBee & Bruno's*, 621 F. Supp. 880, 890-91 (E.D. Mo. 1985) (same), *aff'd in part, rev'd in part on other grounds*, 792 F.2d 726 (8th Cir. 1986).

[19] *See, e.g., Edinburg Community Hotel*, 735 F. Supp. at 1338 ("as an intended, authorized receiver," cable operator "has demonstrated important economic interests in protecting the integrity of the communications system which distributes the programming"); *Quincy Cablesystems*, 650 F. Supp. at 844 ("Quincy, as a cable system operator, has significant economic and professional interests in the integrity of the communications systems."); *Corinth Motel*, 647 F. Supp. at 1189 (intended recipient of intercepted signal had "significant proprietary right"); *Floken*, 629 F. Supp. at 1471 (intended recipient of intercepted signal had "significant 'economic and professional interests in the integrity of the communications systems'").

the boxing match amounted to a violation of Section 605(a),[20] conferring standing upon persons like NSS in effect transmogrifies the statute from a narrow anti-piracy measure into a strict-liability statute that does nothing to serve the statute's purposes. *See* Helland at 127 & n.65.

It is no answer to say, as did the court of appeals, that "the definition of a 'person aggrieved' in § 605(d)(6) is non-exclusive," Pet. App. 15a, and that, by adding that definition in 1988, Congress sought to "expan[d], not limi[t], the group of persons who have standing to sue for its violation," *id.* at 21a. Even if the court of appeals correctly interpreted Congress's intent in adding the 1988 amendment, and even if a plaintiff need not fit within the categories of parties specifically granted standing by that measure, it simply does not follow that *any* person — no matter how remote from the injury the statute sought to prevent — should be entitled to sue. To the contrary, Section 605(d)(6) expressly affords standing only to entities seeking to combat unauthorized interceptors' acts of communications piracy. There is no suggestion that Congress sought to provide legitimate programming distributors with a federal-court forum to settle

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[20] This is doubtful to say the least. The statute is violated only if a person divulges the contents of a communication "to any person other than the addressee." 47 U.S.C. § 605(a). Cable operators receive programming by satellite from programming suppliers and then independently determine to whom they will address it. Thus, it is wrong to view the end user as an "addressee" of the programming supplier; instead, the end user is the addressee of the cable operator (who in turn is the addressee of the programming supplier). *See Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir. 1973) (per curiam) (no violation of first sentence of Section 605(a) where addressee of electronic communication forwarded message to third party); *People v. Wilson*, 94 Cal. Rptr. 923, 925-26 (Cal. Ct. App. 1971) (same). To be sure, by addressing programming to a particular subscriber, a cable operator may breach its contract with its programming supplier. But that is a matter of concern only to state contract law, not to Section 605(a).

disputes concerning the extent of and infringement on each others' contractual rights. Thus, the 1988 amendment counsels against — not in favor of — the broad construction of the "person aggrieved" term that the court of appeals embraced in the decision below.[21]

D. The court of appeals' erroneous decision has far-reaching and alarming consequences. Disputes like the one before the Court — quarrels in which one programming distributor accuses another of straying beyond the scope of a programming-distribution license — have traditionally been resolved under basic principles of state contract law. Under the court of appeals' decision, however, distributors may convert these garden-variety contract disputes into suits in federal court governed by federal law. Plainly, statutes should not be read to effectuate such a drastic readjustment of state and federal responsibilities in the absence of any express indication of congressional intent to that effect. *See, e.g., BFP v. Resolution Trust Corp.*, 511 U.S. 531, 543 (1994); *Kelly v. Robinson*, 479 U.S. 36, 49 n.11 (1986).

The consequences of the court of appeals' decision are all the more pronounced because Section 605 provides for strict liability, statutory damages, and mandatory attorneys' fees. *See* 47 U.S.C. §§ 605(e)(3)(B)(iii), 605(e)(3)(C)(i)(II). Undoubtedly, the court of appeals' decision will trigger a flood of federal suits by programming distributors like NSS,

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[21] *See, e.g., Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1308-09 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.") (internal quotation marks omitted); *United States v. Locke*, 529 U.S. 89, 105 (2000) ("words of a statute should be interpreted consistent with their neighbors to avoid giving unintended breadth to an Act of Congress").

which is already "no stranger to litigation."[22] In the instant case, NSS won damages of $4,500 and attorneys' fees and costs exceeding $26,000 — in connection with programming that the Melody Lane Lounge would not have ordered if it would have been required to pay the roughly $1,000 that NSS charged for it. Thus, for firms like NSS, the court of appeals' decision makes litigation more rewarding than tending to their business.

Finally, such litigation unfairly saddles cable operators with "a federal mandate of infallibility." Pet. App. 27a. Cable systems' architecture is such that every subscriber receives the same signal. Cable operators rely on set-top boxes — electronically instructed from databases maintained at the central "head-end" — to unscramble only the programming to which a particular subscriber is entitled. With more than 67

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[22] *National Satellite Sports, Inc. v. Marzullo*, No. 96 C 6621, 1998 WL 526570, at *4 n.3 (N.D. Ill. Aug 17, 1998); *see also, e.g., National Satellite Sports, Inc. v. My Friend's Place*, No. 00 C 6999, 2001 WL 826919 (N.D. Ill. July 20, 2001); *National Satellite Sports, Inc. v. Marcus Cable Props., Inc.*, No. 99 C 5588, 2000 WL 1774075 (N.D. Ill. Dec. 1, 2000); *National Satellite Sports, Inc. v. Comcast Satellite Communications, Inc.*, No. CIV. H-00-261, 2000 WL 1717304 (D. Md. Nov. 15, 2000); *National Satellite Sports, Inc. v. Kyriakoulis*, No. 97 C 3772, 1998 WL 474116 (N.D. Ill. Aug. 4, 1998). Other distributors are equally litigious. *See, e.g., Kingvision Pay Per View, Ltd. v. Duermeier*, 24 F. Supp. 2d 1179 (D. Kan. 1998); *Kingvision Pay Per View, Ltd. v. Williams*, 1 F. Supp. 2d 1481 (S.D. Ga. 1998); *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995 (D. Md. 1993); *Joe Hand Promotions, Inc. v. Rennard Street Enters., Inc.*, 975 F. Supp. 746 (E.D. Pa. 1997); *Joe Hand Promotions, Inc. v. Burg's Lounge*, 955 F. Supp. 42 (E.D. Pa. 1997); *Joe Hand Promotions v. D.M.B. Ventures, Inc.*, Nos. CIV. A. 93-2656 & 93-3141, 1995 WL 328399 (E.D. La. May 31, 1995); *Joe Hand Promotion, Inc. v. 4300, Inc.*, No. CIV. A. 94-4368, 1995 WL 115405 (E.D. Pa. Mar. 16, 1995).

million cable subscribers nationally,[23] it is simply inevitable that cable operators' subscriber records will occasionally contain erroneous information.[24] Under the court of appeals' approach to standing, any erroneous entry exposes cable operators to suit in federal court, strict liability, statutory damages, and mandatory attorneys' fees. Thus, the court of appeals' mistaken decision threatens the economic viability of providing pay-per-view programming of the kind here at issue, and is therefore of broad significance to the cable industry as a whole.

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[23] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, Table C-1 (2001). Almost one million of these subscribers are commercial establishments. *See* Kagan World Media, *Broadband Cable Financial Databook 2001*, at 11 (2001).

[24] That is particularly true because commercial establishments often intentionally misrepresent themselves as residential subscribers or even extend a cable wire from a nearby residence. *See, e.g., Duermeier*, 24 F. Supp. 2d at 1181; *Taco Rapido*, 988 F. Supp. at 109; *J.P.T.*, 843 F. Supp. at 997-98; *D.M.B. Ventures*, 1995 WL 328399, at *6.

CONCLUSION

The petition for a writ of certiorari should be granted.

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December 7, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-3013 & 00-3437

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff-Appellee,

v.

ELIADIS, INC., D/B/A MELODY LANE LOUNGE, ET AL.,
Defendants,

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
D/B/A TIME WARNER CABLE,
Defendant-Appellant.

[Argued May 2, 2001
Decided and Filed June 11, 2001]

Before: JONES, SILER, and GILMAN, Circuit Judges.

OPINION

GILMAN, Circuit Judge.

On the night of December 14, 1996, the Melody Lane Lounge, a commercial bar located in Massillon, Ohio, showed the live broadcast of a boxing match between Riddick Bowe and Andrew Golota (the event). National Satellite Sports, Inc. (NSS) had obtained the exclusive right to broadcast the event to commercial establishments in Ohio. Time Warner Entertainment Company, L.P. had obtained the exclusive right to broadcast the event on a pay-per-view basis to its Ohio residential customers. The Melody Lane Lounge,

erroneously listed as a residential customer of Time Warner, ordered the event through Time Warner's service.

After learning that the Melody Lane Lounge had shown the event to its patrons on the night in question, NSS brought suit against Eliadis, Inc., the corporate owner of the bar. The suit also named Eliadis's two owners and Time Warner as defendants. NSS alleged that the showing of the event in a commercial establishment through Time Warner's residential service constituted a violation of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613 (Communications Act), which, among other things, prohibits the unauthorized divulgence of wire or radio communications.

Eliadis and its co-owners reached a prompt settlement with NSS. NSS and Time Warner then filed cross-motions for summary judgment against each other. The district court first granted summary judgment to NSS on the issue of liability, and subsequently entered a final judgment awarding NSS damages, costs, and attorney fees.

Time Warner appeals the district court's rulings, claiming that the court erred in failing to give preclusive effect to an adverse judgment against NSS in prior litigation between the parties on an allegedly controlling issue. In the alternative, Time Warner claims that NSS lacks standing to sue under the Communications Act and, in any event, that NSS has failed to establish a violation of that statute. For all of the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

NSS and Time Warner obtained their respective rights to broadcast the event through separate contracts. New Jersey Sports Productions, Inc., d/b/a Main Events (Main Events),

produced the event. It granted Pay Per View Networks, Inc., d/b/a Viewer's Choice (Viewer's Choice), the exclusive right to broadcast the event to residential households. Viewer's Choice, in turn, licensed Time Warner to make the telecast of the event available to residential customers in Ohio. Main Events granted Entertainment by J&J, Inc. (EJJ) a separate exclusive right to broadcast the event to commercial establishments. NSS obtained the right to be the commercial distributor of the event's telecast in Ohio from EJJ.

Main Events created a single telecast of the event and sent it to a transmission station. From the transmission station, the signal was sent to two different satellites. Viewer's Choice received the signal from one of the satellites. It decoded the signal, rescrambled it, and sent it to another set of satellites that transmitted the signal to a Time Warner facility in Akron, Ohio. The Akron facility, known as a "head end," receives programs via satellite and distributes them to subscribers in the Akron region. Because the event was a pay-per-view program, Time Warner encrypted it at the Akron head end so that only subscribers who had ordered the event would be able to decode and view the program.

NSS received its transmission of the telecast from a chain of distribution that traces back to the second satellite that received the initial signal from Main Events. As a result, the signals that NSS and Time Warner received in their respective Ohio facilities both originated from the same initial transmission sent by Main Events, and neither party disputes the right of the other to receive the signals in Ohio according to their separate contracts. Rather, the dispute centers on Time Warner allowing a commercial establishment to view the event on its residential-customer cable network.

Melody Lane Lounge's account was listed in the individual name of Gust Eliadis, a co-owner of Eliadis, Inc. In

February of 1996, Ken Sovacool, a Time Warner employee, serviced Eliadis's cable account. Time Warner concedes that Sovacool should have recognized that the Melody Lane Lounge was a commercial establishment and not a residence. The structure of the building, an exterior identification sign, and neon beer signs in the window made this obvious. Nevertheless, having obtained residential-cable service, the Melody Lane Lounge had the capability to order pay-per-view programs.

Time Warner's account records show that Melody Lane Lounge had ordered one earlier program at the commercial rate. But Melody Lane Lounge ordered the event in question from Time Warner at the residential rate of $39.95. As a commercial establishment, Melody Lane Lounge should have paid NSS for the right to show the event, which would have cost it $987.50.

NSS hired investigators to visit various commercial establishments to monitor whether those showing the event had obtained the right to do so through NSS as the proper distribution channel. An investigator visited the Melody Lane Lounge on the night in question and ultimately determined that it was broadcasting the event through Time Warner's residential pay-per-view system. The Melody Lane Lounge claims that it would not have chosen to show the event had it been required to pay NSS's high commercial rate. Only 23 patrons were in the bar at the time the event was broadcast.

B. Procedural background and prior litigation between the parties

NSS commenced its action in the United States District Court for the Northern District of Ohio in November of 1997. Eliadis, Inc. and its co-owners soon settled with NSS, agreeing to the entry of judgment against them for violating 47 U.S.C. § 605, which is part of the Communications Act, and

paying $250 in nominal damages. NSS's claim against Time Warner proceeded.

In July of 1999, the district court entered summary judgment in favor of NSS, finding that Time Warner had violated § 605. A bench trial on the issue of damages was held several months later. The district court determined that Time Warner was liable for $4,500 in statutory damages. NSS further sought and was awarded attorney fees and costs pursuant to 47 U.S.C. § 605(e)(3)(B)(iii), totaling $26,389.65, in March of 2000. Time Warner appeals the rulings of the district court, raising three alternative arguments.

First, Time Warner contends that the district court erred by failing to give preclusive effect to a separate district court judgment rendered in July of 1998 that arose from a substantially identical claim by NSS against Time Warner. NSS learned that a commercial establishment in Akron, Ohio called Lyndstalder, Inc., d/b/a Coach's Corner, had shown a boxing match between Evander Holyfield and Bobby Czyz that Coach's Corner obtained via residential-cable service from Time Warner in March of 1996. As in the case before us, Time Warner had obtained the exclusive right from the producer to distribute the match to residential customers in Ohio, while NSS received the exclusive license to sell the same program to Ohio's commercial establishments.

NSS commenced an action against Coach's Corner and its owner in the United States District Court for the Northern District of Ohio in August of 1997. When NSS learned of Time Warner's role in providing the broadcast to Coach's Corner, it added Time Warner as a defendant. In that suit, *National Satellite Sports, Inc. v. Lyndstalder, Inc. d/b/a/ Coach's Corner, et al.*, No. 5:97 CV 2039 (N.D.Ohio 1998), NSS alleged that both Coach's Corner and Time Warner had violated 47 U.S.C. § 605. Coach's Corner settled with NSS.

Time Warner then filed a motion for summary judgment, alleging that NSS had failed to establish either a contractual or a statutory claim against it.

The district court held a hearing on Time Warner's motion for summary judgment in July of 1998. It issued a bench ruling at that hearing, granting Time Warner's motion for summary judgment on the basis that NSS "failed to state a claim pursuant to the terms of the contracts [for distribution] at issue in this case as well as 47 U.S.C. § 605." NSS did not appeal. Time Warner argues that the *Coach's Corner* decision precludes NSS from raising the identical § 605 claim in the present case.

Second, even if we conclude that NSS is not bound by the *Coach's Corner* decision, Time Warner argues that NSS does not qualify as a "person aggrieved" under § 605(d)(6). It therefore contends that NSS lacks the standing to sue Time Warner for an alleged violation of § 605.

Finally, as its last line of defense, Time Warner argues that NSS's cause of action under § 605 fails because Time Warner did not "intercept" a communication within the meaning of the Communications Act. It maintains that the clear purpose of the Act is to prohibit and punish acts of communications piracy, which is far removed from what Time Warner says occurred in the present case. Although Time Warner concedes that NSS may have a claim against it based on state-law breach of contract, it argues that NSS has pursued the wrong cause of action under § 605.

II. ANALYSIS

A. Standard of review

We review de novo the district court's grant of summary judgment. *See, e.g., Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir.2000). Summary judgment is proper when there are

no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P. 56(c). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The judge is not to "weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue for trial exists only when there is sufficient "evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252, 106 S.Ct. 2505.

We will not disturb a district court's determination of an award for damages unless clearly erroneous. *See Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir.1994).

B. NSS is not bound by the decision in *Coach's Corner*

NSS brought suit in both this case and in the *Coach's Corner* case under 47 U.S.C. § 605. Section 605 defines what constitutes the unauthorized publication or use of electronic communications. It includes such prohibited practices as the divulgence of wire or radio communications by persons authorized to receive them to others who are not so authorized, and the interception of any radio communication by a person not authorized to receive that communication from the sender. *See* 47 U.S.C. § 605(a). According to § 605, "[a]ny person aggrieved by any violation of subsection (a) of this section . . . may bring a civil action in a United States district court or in any other court of competent jurisdiction." 47 U.S.C. § 605(e)(3)(A). Furthermore, the statute directs that "the term 'any person aggrieved' shall include any person with proprietary rights in the intercepted communication by

wire or radio, including wholesale or retail distributors of satellite cable programming." 47 U.S.C. § 605(d)(6).

In its motion before the court in *Coach's Corner*, Time Warner argued that it was entitled to summary judgment because NSS was not a "person aggrieved" within the meaning of § 605(d)(6), and could therefore not pursue a claim for an alleged violation of § 605(a). NSS responded by arguing that standing to sue under § 605 is not limited to those who meet the statutory definition of a "person aggrieved."

The district court granted Time Warner's motion for summary judgment in the *Coach's Corner* case. In articulating its reasoning from the bench on July 13, 1998, the court held that NSS had failed to state a claim under *both* the contracts at issue in that case *and* under 47 U.S.C. § 605. The pertinent parts of the *Coach's Corner* ruling were as follows:

> With regard to the ruling, [NSS] has failed to state a claim pursuant to the terms of the contracts at issue in this case as well as 47 United States Code Section 605.
>
> . . . . .
>
> Paragraph 14(e) of the Television Licensing Agreement provides for the enforcement of unauthorized display of the closed circuit television feed. That also provides that Joe Hand Promotions [the licensor of the event] could not assert any piracy claim without prior notice.
>
> [The agreement] provides that a sublicensee [NSS] has no rights to enforceability, quote, "It being understood that your sublicensee shall have no right to commence or settle any claim or litigation hereunder."
>
> The other relevant agreement is the March 12, 1996 Closed Circuit Television Agreement entered into between [the licensor] and [NSS].

> That agreement at paragraph 7 provides that there is no right to a piracy action to be pursued by [NSS].
>
> [NSS's] effort to overcome the language of the contract does not create a material fact for trial.

Time Warner now argues that the district court below should have given preclusive effect to the earlier ruling in *Coach's Corner*. It claims that *Coach's Corner* determined that when a commercial establishment shows a sporting event ordered through a residential-cable service rather than properly paying the fees exacted by the commercial distributor, the distributor does not have standing to sue the authorized residential-service provider under § 605. NSS obviously disagrees.

Our circuit has held that a prior decision shall have preclusive effect on an issue raised in a later case if four elements are met:

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Smith v. SEC, 129 F.3d 356, 362 (6th Cir.1997) (en banc) (quoting *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir.1987)).

In the present case, the district court concluded that Time Warner had failed to establish the second and fourth elements of this test. Because Time Warner and NSS disagree as to whether these four elements were met, an analysis of each is necessary in order to decide if the district court erred by

failing to give preclusive effect to the *Coach's Corner* decision.

1. Identity of issues

Time Warner argues that the *Coach's Corner* court was faced with the precise threshold question that the district court encountered in the current case. This question is whether NSS has standing to sue under § 605; in particular, whether NSS had a proprietary interest in the communication that was sent from Time Warner via its authorized residential-cable service to its pay-per-view customers. Time Warner further contends that the bifurcation of the satellite transmission of the Holyfield/Czyz boxing match at issue in *Coach's Corner* was identical to the manner in which the event in question was sent to Time Warner and NSS in Ohio on December 14, 1996.

NSS counters that there is no identity of issues in these two cases. First, it contends that the transmissions at issue in *Coach's Corner* are distinguishable from the ones involved in the present case. Specifically, Time Warner distributed the Holyfield/Czyz boxing match to its residential customers through its Home Box Office (HBO) service, not through a pay-per-view network. The difference is that all residential HBO subscribers had access to view the Holyfield/Czyz match, whereas only the residential customers who ordered the Bowe/Golota event through the pay-per-view network could view the program. Second, NSS argues that the licensing agreements as between Time Warner and NSS were fundamentally different.

We believe that Time Warner's argument is the more persuasive on this "identity of issues" element. Although HBO and pay-per-view are different subscriber services, the key issue in both cases is the same — the consequences of a commercial establishment gaining access to view a boxing

match by being inaccurately listed as a residential customer of Time Warner. As a result, Time Warner has satisfied the first element for issue preclusion.

2. Necessary to the outcome of the prior proceeding

The district court held that Time Warner failed to establish that NSS's lack of standing under § 605 was necessary to the grant of summary judgment for Time Warner in *Coach's Corner*. It determined that the *Coach's Corner* decision was instead primarily based on the conclusion that NSS was contractually barred from pursuing an action against Time Warner because of the particular language in the license agreements involved in that case. As such, it held that the alternative ground in *Coach's Corner* for granting Time Warner's motion for summary judgment — namely, that NSS was not a "person aggrieved" under § 605 — was not necessary to that court's judgment.

Time Warner argues that the district court erred in reaching this conclusion. It notes that *Coach's Corner* is a case in which two alternative but independent grounds support the court's ultimate judgment. Time Warner claims that under the "weight of federal authority, a plaintiff is precluded from relitigating an issue actually decided against it in a prior case, even if the court in the prior case rested its judgment on alternative grounds." It cites the Second, Seventh, Ninth, and D.C. Circuits as upholding this general principle of issue preclusion. *See Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.1977); *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir.1987); *In re Westgate California Corp.*, 642 F.2d 1174, 1176 (9th Cir.1981); *Yamaha Corp. of America v. United States*, 961 F.2d 245, 255 (D.C.Cir.1992).

This principle of issue preclusion, however, is counterbalanced by courts and commentaries that have adopted the

opposite conclusion. For example, the American Law Institute (ALI) endorses NSS's position that "[i]f a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27 cmt. i (1980). Furthermore, one leading commentary describes the Restatement's view as the "new" and "modern" rule. *See* 18 James Wm. Moore et al., Moore's Federal Practice ¶ 132.03[4][b] at 132-111 to 132-113 (3d ed. 1997). At least four circuits (the Third, Fourth, Eighth, and Tenth) have adopted this modern rule. *See Arab African Int'l Bank v. Epstein*, 958 F.2d 532, 535 (3d Cir. 1992); *Ritter v. Mount St. Mary's College*, 814 F.2d 986, 993-94 (4th Cir.1987); *Baker Elec. Co-op v. Chaske*, 28 F.3d 1466, 1475-76 (8th Cir.1994); *Turney v. O'Toole*, 898 F.2d 1470, 1472 n. 1 (10th Cir.1990). In addition, the Seventh Circuit has embraced the modern rule in the context of the Black Lung Benefits Act in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008 (7th Cir.1997) (en banc), without citing its contrary holding in *Magnus Electronics*, 830 F.2d at 1402.

The issue is a close one given the policy implications involved. Time Warner argues that by not recognizing *Coach's Corner* as precluding relitigation of whether NSS has standing to sue under § 605, NSS is free to relitigate the same issue again. NSS counters by arguing that because the *Coach's Corner* court decided that NSS was contractually barred from pursuing a claim against Time Warner, NSS had no incentive to appeal that court's secondary decision that NSS failed to state a claim under § 605.

We find NSS's point persuasive because, while it might have won the "battle" over § 605, NSS would almost surely have lost the "war" in being unable to overcome the contractual prohibition on commencing litigation against Time

Warner. Furthermore, the district court's oral ruling in *Coach's Corner* transcribes into only a two-paragraph conclusory statement regarding NSS's claim under § 605, which was far overshadowed by the balance of its three-page discussion outlining the contractual obstacles that prevented NSS from suing Time Warner.

This circuit has not decided whether alternative grounds for a judgment are each "necessary to the outcome" for the purposes of issue preclusion in a subsequent case involving only one of the grounds. Based on the actual decision in *Coach's Corner*, we do not find it necessary to fully resolve this issue at the present time. We do hold, however, that where, as in *Coach's Corner*, one ground for the decision is clearly primary and the other only secondary, the secondary ground is not "necessary to the outcome" for the purposes of issue preclusion. *Coach's Corner*'s secondary holding that NSS failed to state a claim under § 605 was thus not necessary to the granting of Time Warner's motion for summary judgment.

3. Final judgment on the merits

Although the district court held that the *Coach's Corner* decision was a final judgment on the merits for the purpose of issue preclusion, NSS argues that it was not. In particular, it claims that the court's judgment in *Coach's Corner* was a dismissal of NSS's suit without prejudice for failure to state a claim. This argument is without merit. *Coach's Corner* granted Time Warner's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Furthermore, the district court made clear that its judgment was final. It recognized that "both parties will more than likely have a disagreement over everything I say, pretty much, and you can take it up to the Sixth Circuit and they can tell us whether I was right or wrong." Finally, summary judgment is recognized as a final judgment for the purpose of issue preclusion. *See Mayer v. Distel Tool & Mach. Co.*, 556

F.2d 798 (6th Cir.1977) (holding that where the facts and legal theory of a complaint are identical to those of a previous complaint, a grant of summary judgment on the prior complaint is a final judgment and could be the basis for issue preclusion in a subsequent case). Time Warner has therefore satisfied this third element for issue preclusion.

4. Full and fair opportunity to litigate

Turning to the final element, Time Warner contends that the district court in *Coach's Corner* granted its motion for summary judgment after full briefing and argument, and that both parties had a sufficient opportunity to litigate the § 605 issue before that court. NSS, however, argues that the district court in *Coach's Corner* primarily focused on the question of whether NSS's license agreement contractually barred it from initiating a suit against Time Warner. It therefore contends that the question of whether NSS had a proprietary right in the communication under § 605 was secondary. The district court agreed with NSS.

We believe that Time Warner has the more persuasive argument on this issue. Nothing in the *Coach's Corner* case prevented either NSS or Time Warner from raising all potential arguments about the applicability of § 605 to the circumstances of their case. Despite the contractual language that was ultimately held to bar NSS from raising a claim against Time Warner in *Coach's Corner*, NSS still had a full and fair opportunity to litigate the claim that it raised under § 605. As such, we conclude that Time Warner has satisfied this final element for issue preclusion.

In sum, we agree with the district court that the second element ("necessary to the outcome") set forth in *Smith v. SEC*, 129 F.3d 356, 362 (6th Cir.1997) (en banc), has not been met, but disagree that the fourth element ("full and fair opportunity to litigate") was lacking. But because all four

elements of *Smith* must be satisfied before the prior opinion will be given preclusive effect, NSS is not bound by the decision in *Coach's Corner*. We therefore turn to the issues of whether NSS has standing to sue under § 605 of the Communications Act and whether it has sufficiently established a claim against Time Warner for a violation of that Act.

C. NSS has standing to sue Time Warner because the definition of a "person aggrieved" in § 605(d)(6) is nonexclusive

Congress enacted the Cable Communications Policy Act of 1984 to address "a problem which is increasingly plaguing the cable industry — the theft of cable service." H.R.Rep. No. 98-934, at 83 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4720. This statute amended and supplemented the Communications Act. *See id.* The 1984 legislation added subsections (b)-(e) to § 605. These new provisions were intended to address "the growing practice of individuals taking down satellite delivered programming for private, home viewing by means of privately owned backyard earth stations." *See* 1984 U.S.C.C.A.N. at 4745. The original prohibitions contained in § 605, however, were retained without amendment in what is now codified at § 605(a).

Section 605(a), therefore, lists the types of unauthorized publication or use of electronic communications that have been prohibited since the Communications Act first became law. It sets forth separate prohibitions in each sentence. The first sentence states:

> [N]o person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of

> transmission or reception . . . to any person other than the addressee, his agent, or attorney. . . .

47 U.S.C. § 605(a). The second sentence of § 605(a) prohibits piracy as is it traditionally understood:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.

Id. Finally, the third sentence provides:

> No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

Id.

Congress has criminalized the unauthorized interception of communications prohibited by § 605(a). *See* 47 U.S.C. § 605(e)(1). Subsection (e) also provides for private civil enforcement of § 605 as now amended. *See* 47 U.S.C. § 605(e)(3)(A) ("Any person aggrieved by any violation of subsection (a) of this section . . . may bring a civil action in a United States district court or in any other court of competent jurisdiction."). As a result, § 605 sets forth both civil and criminal penalties for its violation. *See* 47 U.S.C. § 605(e). Furthermore, § 605(e) designates varying penalties, depending on whether or not a violation of the section was willful. The term "person aggrieved" was not defined when § 605(e)(3)(A) was originally enacted.

Section 605 of the Communications Act was further amended by the Satellite Home Viewer Act of 1988, Pub.L. No. 100-667, § 205, 102 Stat. 3959-60. That Act amended

§ 605 by adding the following definition of a "person aggrieved" to § 605(d):

> (d) Definitions
>
> For purposes of this section —. . .
>
> (6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming. . . .

47 U.S.C. § 605(d)(6). The Communications Act elsewhere defines a "communication by wire" as a "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection," 47 U.S.C. § 153(a), and a "communication by radio" as a "transmission by radio of writing, signs, signals, pictures, and sounds of all kinds," 47 U.S.C. § 153(b).

Time Warner contends that Congress would not have amended § 605 to add the definition of "any person aggrieved" if it had intended to grant broad standing to anyone potentially injured by the statute. Rather, Time Warner argues that Congress intended to *limit* standing to sue under § 605 to those who meet the definition of a "person aggrieved" under § 605(d)(6). As a result, Time Warner claims that the district court erred in concluding that NSS had standing to sue under § 605.

The district court held that the use of the word "include" in the statutory phrase "any person aggrieved shall *include* any person . . ." does not mean that *only* persons who meet that definition have standing to sue. We agree. The district court's interpretation is consistent with the legislative history of § 605(d). In the House Report accompanying the 1988 amendment to § 605 that added the definition of "person

aggrieved" under § 605(d)(6), the purpose of the amendment was explained as follows:

> Section 5 of [the Satellite Home Viewer Act of 1988] amends [§ 605] of the Communications Act pertaining to the piracy of satellite cable programming. The Committee's amendment is intended to deter piracy practices by (1) stiffening applicable civil and criminal penalties, (2) *expanding standing to sue*, and (3) making the manufacture, sale, modification . . . of devices or equipment with knowledge that its primary purpose is to assist in unauthorized decryption of satellite cable programming expressly actionable as a criminal act.

H.R.Rep. No. 100-877(II), at 28, *reprinted in* 1988 U.S.C.C.A.N. 5638, 5657 (emphasis added).

Limiting the availability of civil actions to those persons who meet the definition of a "person aggrieved" in § 605(d)(6), and requiring that they have "proprietary rights in [an] intercepted communication," is inconsistent with the intent of Congress as expressed in the Cable Communications Policy Act of 1984 and the Satellite Home Viewer Act in 1988. Both acts were intended to expand the scope of protection provided by the Communications Act, not limit it. In particular, Time Warner's argument flies in the face of Congress's explicit interest in "expanding standing to sue" under the Act. By adding satellite communications under the protection of § 605, along with wire and radio communications, Congress sought to make clear that those with "proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming," 47 U.S.C. § 605(d)(6), have standing to sue.

But this explicit reference to a subset of persons aggrieved was not intended to exclude others who sustain injuries from a violation of any of the prohibitions originally listed in

§ 605(a). In particular, the prohibition in the first sentence of § 605(a) does not involve the interception of a communication at all. It prohibits intermediaries who are *authorized* to receive a communication by wire or radio from divulging the contents of the transmission to any person other than the addressee intended by the sender.

Our circuit has previously recognized Congress's intent to expand rather than contract the reach of the Communications Act when it amended § 605:

> In view of [promoting the growth of satellite programming and facilitating individual reception of unencrypted satellite signals], Congress amended the Communications Act to authorize the receipt of unscrambled satellite programming for private viewing[, w]hile *leaving intact the prohibitions against unauthorized use of radio or wire communications contained in 47 U.S.C. § 605(a).*

Loschiavo v. City of Dearborn, 33 F.3d 548, 551 (6th Cir. 1994) (emphasis added). Time Warner, however, argues that § 605 "is violated only when a person both intercepts and divulges a communication," citing *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir.1973), and *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023 (6th Cir.1968). The district court acknowledged these older precedents in a footnote, but distinguished them on the basis that they were both decided before the 1984 and 1988 amendments to the Communications Act. Both cases are also distinguishable on their facts.

Smith, for example, involved an employee of the Domestic Relations Court in Hamilton County, Ohio who had a telephone conversation with Howard Wunker, a private citizen. The court employee told Wunker that he could arrange a "fix" in a divorce case pending in that court. Wunker recorded this conversation and released the recording to the local

newspaper, which published the contents of the Smith Wunker conversation. *See Smith*, 475 F.2d at 740-41. Smith sued both the newspaper and Wunker. The decision in *Smith*, a two-page per curiam opinion, primarily discusses Smith's claim under the Federal Wiretap Law, 18 U.S.C. § 2520, which it found inapplicable. It then summarily concluded that Smith's claim under § 605 must also be dismissed, "since that section is violated only when a person both intercepts and divulges a communication, which is not the case in regard to this defendant." *Id.* at 741 (citing *Bufalino*, 404 F.2d at 1027).

Because Wunker was the intended addressee/recipient of Smith's telephone conversation and no "interception" of a communication was involved, § 605 was not implicated by the fact situation in *Smith*. As such, the broad statement in *Smith* to the effect that § 605 requires both an interception and divulgence of a communication is dicta, because it was not necessary for the disposition of that case. *See Coca-Cola Co. v. Procter & Gamble Co.*, 822 F.2d 28, 30 (6th Cir.1987) (holding that a prior case's sweeping language regarding a section of the Lanham Act was not binding where it only addressed a narrow issue thereunder and failed to address other issues arising within the same section).

Bufalino is also distinguishable. In that case, William Bufalino was a residential customer of a Michigan telephone company. Two company linemen were working on a telephone pole to transfer lines in a cable box. Because one of the servicemen had incomplete information, he tried to call the office by connecting to an unknown line in the cable box. In actuality, he called Bufalino's residence. Bufalino then sued the Michigan telephone company, alleging that its workers had illegally tapped into his home telephone line in violation of § 605. His complaint specifically alleged a violation of the second sentence of § 605 only, which is now the

second sentence of § 605(a) as a result of the amendments contained in the Cable Communications Policy Act of 1984. According to that sentence, "[n]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." 47 U.S.C. § 605(a).

This court affirmed the dismissal of Bufalino's complaint, concluding that there was no intercepted communication involved. *Bufalino*, 404 F.2d at 1027. Consequently, *Bufalino*'s statement that "[i]n order to constitute a violation of Section 605 there must be both an interception and a divulgence," *id.*, though worded expansively, is properly confined to an interpretation of the second sentence of § 605(a). The statements from *Smith* and *Bufalino* that purportedly limit the scope of § 605 are thus overly broad, taken out of context, and therefore not definitive in determining the applicability of § 605 to the present circumstances. *See Coca-Cola*, 822 F.2d at 30.

In conclusion, we find no merit in Time Warner's argument that NSS does not have standing to sue under § 605. We agree with the district court that the plain language of the word "include" in § 605(d)(6) does not render the definition of a "person aggrieved" an exclusive one. Furthermore, the legislative history of the amendments to the Communications Act in 1984 and 1988 reveals that Congress intended to bring cable and satellite communications under the protection of that Act by expanding, not limiting, the group of persons who have standing to sue for its violation. Consequently, we hold that the definition of a "person aggrieved" in § 605(d)(6) is nonexclusive, and that the district court did not err in determining that NSS had standing to sue Time Warner under § 605.

D. Time Warner violated the first sentence of § 605(a)

Time Warner next argues that the district court erred in holding Time Warner liable for violating § 605(a). First, it contends that an interception is required to state a claim for a violation under that section. Second, it maintains that it is not liable under either the first or third sentences of § 605(a), even if an interception is not a required element of the violation.

To start with, Time Warner argues that NSS had no proprietary right in the telecast that Time Warner was distributing. Essentially, according to Time Warner, an electronic *transmission* can be severed from the *content* of the material that is being transmitted. To support the view that § 605 only protects the physical means of a transmission and not its content, Time Warner cites *Goldman v. United States*, 316 U.S. 129, 134, 62 S.Ct. 993, 86 L.Ed. 1322 (1942), *overruled on other grounds by Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). The Court in *Goldman* stated that "[t]he protection intended and afforded by the [original Communications Act] is of the *means of communication.*" 316 U.S. at 133, 62 S.Ct. 993 (emphasis added).

But Goldman actually supports the conclusion that the Communications Act was designed to protect the content of a transmission as well. In that case, federal agents used non-electronic eavesdropping instruments to listen to conversations in an enclosed room by persons who were eventually indicted for conspiracy to violate the Bankruptcy Act. *See id.* at 130-31, 62 S.Ct. 993. One of those defendants argued that the federal agents had violated the Communications Act by overhearing and divulging the contents of what he said while on the telephone. Holding that such overhearing and divulging was not a violation of § 605, the Court stated:

> What is protected is the message itself throughout the course of its transmission by the instrumentality or agency of transmission. Words written by a person and intended ultimately to be carried as so written to a telegraph office do not constitute a communication within the terms of the Act until they are handed to an agent of the telegraph company.

Id. at 133, 62 S.Ct. 993.

The above passage underscores the protection provided by § 605 to the message's content once it is in the pipeline of an electronic transmission. That § 605 protects both the transmission and its contents is consistent with the statutory definition of a "communication." *See, e.g.*, 47 U.S.C. § 153(a) (stating that a "communication by wire" is a "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection.").

Both NSS and Time Warner had contracted with distributors authorized by Main Events for the right to obtain a transmission of the event on the night of December 16, 1996. The difference between their rights was that NSS contracted for the right to distribute the communication to commercial establishments, while Time Warner obtained the right to relay the communication to residential customers. As such, both parties had proprietary interests in the *transmission* of the *content* of the boxing match, regardless of the satellite transfers or encryptions that the transmissions underwent in the process.

Given that NSS had a proprietary interest in the transmission of the event, the next question is whether Time Warner "intercepted" that communication. We conclude that it did not. The Supreme Court has defined an interception for the purposes of § 605 to be a "taking or seizure by the way or before arrival at the destined place." *Goldman*, 316 U.S. at

134, 62 S.Ct. 993. Under this definition, Time Warner did not intercept the communication at issue. Rather, it simply redirected the authorized transmission of the event to its subscribers who ordered the program, including one, the Melody Lane Lounge, that was incorrectly listed as a residential customer.

But the absence of an "interception" does not get Time Warner off the hook of § 605. As previously explained, Time Warner's reliance on *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir.1973), and *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023 (6th Cir.1968), is misplaced. Similarly, Time Warner's citation to *Cablevision of Michigan, Inc. v. Sports Palace, Inc.*, No. 93-1737, 1994 WL 245584 (6th Cir. June 6, 1994) (unpublished table decision), is unavailing. In *Cablevision*, a distributor with exclusive rights to broadcast a boxing match to commercial establishments sued a sports bar under § 605 that had improperly obtained the boxing match from a residential pay-per-view service. *Cablevision* cited *Smith* for the proposition that when "there [is] no interception, the mere fact that the bar divulged or published [a similar boxing match] cannot make it liable under Section 605(a)." *See id.* at *4 (citing *Smith*, 475 F.2d at 741) (original alterations and internal quotation marks omitted).

For the reasons previously discussed, however, this proposition is not a correct statement of the law. *Smith*'s holding is limited to an interpretation of the second sentence of § 605(a), not the entire provision. As a result, *Cablevision*'s reliance on the broad dicta from *Smith* is misplaced. Because *Cablevision* is an unpublished decision, we are not bound by its holding. *See McCloud v. Testa*, 97 F.3d 1536, 1559 n. 36 (6th Cir.1996).

We are bound, however, to properly apply the first sentence of § 605(a). An authorized intermediary of a communication (such as Time Warner) violates the first sentence of § 605(a) when it divulges that communication through an electronic channel to one "other than the addressee" intended by the sender (such as Main Events). Time Warner responds by arguing that at all times it was transmitting the event through fully authorized channels. But this is incorrect, because Time Warner was not authorized to transmit the event to commercial establishments.

When viewed in this light, we conclude that the district court did not err in holding that Time Warner violated the first sentence of § 605(a). The district court found that Time Warner had improperly divulged the communication of the event to the Melody Lane Lounge, an "addressee" that was not authorized by Main Events to receive it from Time Warner. This conclusion finds support from the case of *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F.Supp. 995 (D.Md.1993). That court, faced with a similar fact pattern to the one in *Cablevision*, held that

> [e]ven assuming, as these defendants contend, that there was no "interception" here because [the bar] was "authorized" by [the residential distributor] to receive the Event on a pay-per-view basis, defendants still have violated the Act because they clearly were not authorized to then broadcast the Event to the patrons of a commercial establishment such as [the bar]. . . . [T]he first and third sentences of [§ 605(a)] do not . . . require an "interception" of a cable transmission and clearly proscribe the unauthorized divulgence or use of communications which have been "received" legally for certain purposes.

Id. at 999.

A similar conclusion was reached in the unreported case of *Joe Hands Promotions v. D.M.B. Ventures, Inc.*, Nos. CIV. A 93-2656, CIV. A. 93-3141, 1995 WL 328399 (E.D.La. May 31, 1995) (unpublished table decision). In *Joe Hands Promotions*, Cox Cable had the exclusive right to distribute a boxing match to its residential customers via pay-per-view programming, while Joe Hand Promotions had the exclusive right to distribute the event to commercial establishments. Just as NSS has sued Time Warner in the case before us, Joe Hand Promotions sued Cox Cable for providing the broadcast of the event to several commercial establishments that were erroneously receiving residential service from Cox Cable. *See id.* at *2. That court held as follows:

> It is undisputed that Cox Cable received the pay-per-view event satellite signal, divulged the satellite signal via co-axial cable to three commercial establishments not authorized to receive the event, and that it received payment from the restaurants. These facts are sufficient to impose liability under the first and third sentences of Section 605(a).

Id. at *6.

We thus conclude that even though Time Warner did not intercept the communication in question, it nonetheless divulged the telecast of the event to an unauthorized addressee in violation of the first sentence of § 605(a). Time Warner, however, makes a compelling argument that it did not violate the third sentence of § 605(a). According to that sentence, "*[n]o person not being entitled thereto* shall receive or assist in receiving any interstate or foreign communication by radio and use such communication . . . for his own benefit or for the benefit of another not entitled thereto." 47 U.S.C. § 605(a) (emphasis added).

We read the clause "no person not being entitled thereto" as referring to persons who were never authorized to receive the communication in question. Unlike the first sentence of § 605(a), which looks at the relationship between the original sender and the ultimate receiver in determining whether the communication is authorized, the third sentence only applies to persons who were never authorized to be in possession of the communication in the first place.

Time Warner does not fit within this definition, because it was contractually authorized to receive the communication of the event at its head end in Akron and to further relay that communication to its residential customers in the area. We therefore cannot agree with the district court that Time Warner violated the prohibition enunciated in the third sentence of § 605(a). Nonetheless, Time Warner is unable to escape liability under the first sentence of § 605(a) for divulging the communication that it was authorized to distribute on a limited basis only, when one of the recipients of that transmission was an unauthorized addressee of Main Events, the sender.

Although Time Warner protests that this outcome results in a federal mandate of infallibility on the part of cable operators, we believe that Congress enacted the Communications Act and the subsequent amendments thereto to protect the integrity of electronic communications from negligent as well as willful divulgences by intermediaries. Section 605(e), for example, distinguishes between willful and nonwillful divulgences in the setting of statutory damages. Both NSS and Time Warner were such intermediaries in the transmission of the event in question, and were only authorized to partake in the transmission insofar as their respective transmission rights authorized them to do so. Because the Melody Lane Lounge was not authorized by Main Events to receive the transmission

of the event from Time Warner, Time Warner has violated the prohibitions of the first sentence of § 605(a).

E. The district court's findings of statutory damages, attorney fees, and costs were not clearly erroneous

Finally, Time Warner challenges the district court's award of $4,500 in statutory damages to NSS and its order for Time Warner to pay NSS's attorney fees and costs in the sum of $26,389.65. It argues that the amount of damages was disproportionate, especially in light of what NSS's measure of damages would have been under state contract law. The district court held a hearing in order to assess NSS's damages and issued two separate memorandum opinions on this issue. It first determined the amount of damages according to its authority under 47 U.S.C. § 605(e)(3)(C)(i)(II), and explained its award in an eight-page opinion dated December 19, 1999. It then calculated the award for attorney fees and costs under 47 U.S.C. § 605(e)(3)(B)(iii), setting forth its reasoning in a four-page opinion dated March 23, 2000.

Time Warner's basic argument is that the award is grossly disproportionate to any harm suffered by NSS. The district court, however, provided a detailed account of its findings of fact and conclusions of law with regard to the calculation of damages. Significantly, it found that Time Warner did not willfully violate the statute, and therefore the court did not impose any of the additional penalties provided by the statute for such a violation. *See, e.g.*, 47 U.S.C. § 605(e)(3)(C)(ii) (granting courts the discretion to increase an award of damages by an amount of not more than $100,000 for each violation of subsection (a) if the violation is willful).

According to § 605(e)(3)(C)(i)(II), a party aggrieved by a nonwillful violation of § 605 may recover damages of not less than $1,000 or more than $10,000 "as the court considers just." The district court found that NSS would have received

almost $1,000 if the Melody Lane Lounge had purchased the event from NSS. It further recognized that NSS paid $1,785 to investigate compliance in the Akron area with NSS's transmission rights to broadcast the event on the night in question. NSS also presented proof that it incurred approximately $1,700 in administrative costs that were necessary to identify Time Warner as the source of the Melody Lane Lounge's transmission of the event, even though this figure was not mentioned in the district court's formal findings of fact. Although the district court did not specify precisely how it arrived at the final figure of $4,500, we conclude that the proof supports the damage calculation, that the amount is well within the statutory range, and that the award is not clearly erroneous.

We also find no error in the district court's award of attorney fees and costs to NSS. Time Warner did not dispute the hourly rate charged by NSS's attorneys as unreasonable. In addition, the district court disallowed the cumulative hours charged by a second NSS attorney that it felt should not be imposed on Time Warner. We therefore find no basis to set aside the award of attorney fees and costs to NSS.

III. CONCLUSION

In conclusion, we hold that NSS is not precluded from bringing this action against Time Warner, that NSS has standing to sue, and that NSS has established Time Warner's violation of the first sentence of 47 U.S.C. § 605(a). For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[July 30, 1999]

MEMORANDUM OPINION

DOWD, District Judge.

Before the Court are the parties' cross-motions for summary judgment (Doc. Nos. 37 and 38). For the reasons stated below, the Court finds that defendant's motion for summary judgment (Doc. No. 38) should be denied and that plaintiff's motion for summary judgment (Doc. No. 37) should be granted in part and denied in part.

I. BACKGROUND

Plaintiff National Satellite Sports, Inc., brought this case under 47 U.S.C. § 605, alleging a violation of that statute by defendant, Time Warner Entertainment Co. Plaintiff had the exclusive license to transmit the December 14, 1996, "Bowe-Galota Boxing Match" ("the Event") to commercial

establishments.[1] Plaintiff alleges that, while defendant had the authority to transmit the Event to residential customers, defendant did not have the right to transmit it to commercial customers. It is undisputed that defendant received the Event signal from a satellite, transmitted the Event to a commercial customer, the Melody Lane Lounge,[2] and charged the customer a residential rate for the transmission. Defendant claims that, at the time of the transmission, and unknown to defendant, the Melody Lane Lounge was improperly listed in defendant's records as being a residential customer.

Plaintiff seeks statutory damages in the amount of $7,700 under § 605(e)(3)(C)(i)(II) as the remedy for the loss of "the revenue which would have been derived from the delivery and exhibition of the Event to 'Melody Lane Lounge' and its patrons." It also seeks attorney fees and costs pursuant to § 605(e)(3)(B)(iii). Additionally, plaintiff seeks statutory damages in the amount of $23,200 pursuant to § 605(e)(3)(C)(ii) as a discretionary increase due to the alleged willfulness of defendant's actions.[3] Defendant asserts

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[1] Defendant, in its "Supplemental Brief" on the issue of summary judgment, filed on February 12, 1999, raises an objection to plaintiff's alleged failure to provide evidence in support of plaintiff's claim that it had the exclusive right to transmit the Event to commercial establishments in Ohio. Defendant will not be heard to complain of this alleged failure at this late date, in light of its earlier admission of that very assertion on the first page of its "Memorandum in Opposition to Plaintiff's Request to Disclose Discovery" (Doc. No. 30).

[2] The Melody Lane Lounge was originally a named defendant in this case, but was termed from the lawsuit on June 9, 1998 (Docket No. 21).

[3] Plaintiff has modified its damage claims somewhat. Plaintiff originally stated, in the Complaint, that it sought $10,000 in statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II), $100,000 in statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(ii), full costs of the action (including attorney fees), and any other relief this Court were to deem just and proper.

that plaintiff has failed to state a claim under the statute, that plaintiff is not an "aggrieved person" within the meaning of the statute, that plaintiff's arguments are collaterally estopped, and that its actions were not willful.

II. SUMMARY JUDGMENT

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. When a court considers a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). However, the adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The Rule requires the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). General averments or conclusory allegations of an affidavit do not create specific fact disputes for summary judgment purposes. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts . . . earlier deposition testimony." *Reid v. Sears Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir.1986) (citing *Biechele v. Cedar Point, Inc.*, 747 F.2d

209, 215 (6th Cir.1984)). Further, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir.1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252, 106 S.Ct. 2505).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby*, 477 U.S. at 250, 106 S.Ct. 2505.

III. LAW

The applicable statute, 47 U.S.C. § 605, provides, in pertinent part:

> **(a) Practices prohibited**
>
> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio

communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

Additionally, the statute discusses the available damages:

[(e)(3)] (C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in

> computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or
>
> **(II)** the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just, ...
>
> **(ii)** In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

Satellite signals constitute "radio" signals for purposes of this statute. *See U.S. v. One Macom Video Cipher II, SN A6J050073*, 985 F.2d 258, 260 (6th Cir.1993).

IV. THE PARTIES' POSITIONS

Defendant argues that it is entitled to summary judgment because: (1) the doctrine of collateral estoppel precludes plaintiff from litigating, in this case, the issue of whether it has a protected interest for which relief can be granted under § 605;[4] (2) plaintiff is not an "aggrieved" person within the meaning of § 605 and, therefore, cannot succeed in this

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[4] According to defendant, this same legal issue was decided in defendant's favor in another case in the Northern District in which the facts and legal issues were "identical."

action; and (3) plaintiff cannot demonstrate that defendant "intercepted" the signal of the Event, and interception is a required element of a violation of § 605.

Plaintiff, on the other hand, argues that it is entitled to summary judgment because: (1) defendant has admitted facts that constitute a willful violation of § 605; and (2) plaintiff is an "aggrieved" person within the meaning of § 605. It also asserts that it is entitled to $30,800 in damages plus costs and attorney fees as a matter of law.

V. DISCUSSION

For the reasons contained in the following discussion, this Court finds that plaintiff's claim is not barred by the doctrine of collateral estoppel; that plaintiff is an aggrieved person within the meaning of § 605; that defendant's conduct violated § 605; and that the determination of the amount of damages, including whether plaintiff is entitled to additional damages for willfulness, must be left for the trier of fact. These conclusions necessarily mean that defendant will be liable for some amount in damages to plaintiff for its violation of § 605 and will be ordered to pay plaintiff's full costs, including reasonable attorney fees. *See* 47 U.S.C. § 605(e)(3)(B)(iii).

A. COLLATERAL ESTOPPEL

Defendant's assertion the plaintiff's claim is collaterally estopped by a prior determination in another case is not well-taken. Two of the requirements for the application of collateral estoppel, as conceded by defendant, are that there must have been a full and fair opportunity to litigate the issue and that determination of the issue in question must have been necessary of essential to the judgment in the prior action. *See Smith v. Sushka*, 117 F.3d 965, 973 (6th Cir.1997) (citing *Goodson v. McDonough Power Equipment, Inc.* (1983), 2 Ohio St.3d 193, 443 N.E.2d 978). Defendant asserts that the

issue of "satellite piracy" was "plainly necessary to the final judgment" in a prior case captioned *National Satellite Sports, Inc. v. Lynstalder, Inc.*, No. 5:97CV2039 (N.D.Ohio). Therefore, according to defendant, the "essential to the judgment" requirement is satisfied. This does not follow, however. Defendant does not (and, in fact, could not) argue that the general issue of "satellite piracy" is the issue collaterally estopped. Rather, defendant is arguing that, in the prior case, the court determined that National Satellite had no "proprietary interest" in a signal received and sent (allegedly inadvertently) by Time Warner to a commercial establishment, because it was physically distinct from the signal that National Satellite received and then sent to its contractually-authorized, commercial-establishment recipients. This is the issue that defendant claims is collaterally estopped.

Defendant has not demonstrated, as it must, that the determination of this particular issue was essential to the judgment in Lynstalder, supra. The court in that case first concluded, at the summary judgment stage, that National Satellite had failed to state a claim because it had entered into a contract, the terms of which specifically provided that National Satellite had no right to pursue a piracy action. Lynstalder, supra, Transcript of Oral Hearing on Defendant's Motion for Summary Judgment, July 13, 1998, 35-39 (Defendant's Motion for Summary Judgment, Exh. 5). The court further held that, "[e]ven considering [parol evidence purporting to negate that contractual provision]," National Satellite had failed to state a claim under § 605 because it had no proprietary interest in the allegedly intercepted communication — that is, the signal sent by the entity authorized to send it to residential customers only. *Id.* This second basis for the holding was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action.

Regarding the alleged "full and fair opportunity to litigate" this issue, defendant states, simply, that:

> A final judgment was rendered on the merits in the previous case after a full and fair opportunity to litigate. The case was decided on summary judgment after the litigants presented in Court their motions and evidence.

Defendant points to nothing in the record to support this conclusion. This hardly satisfies defendant's burden of demonstrating to the Court that there was such a "full and fair opportunity to litigate" the issue of whether National Satellite had a proprietary interest in the signal allegedly intercepted. Defendant has failed to demonstrate that this issue is collaterally estopped.

B. "AGGRIEVED" PERSON

Regarding the definition of an "aggrieved" person for purposes of § 605, the Court notes that the statute provides that "the term 'any person aggrieved' shall *include* any person with proprietary rights in the intercepted communication . . ." See 47 U.S.C. § 605(d) (emphasis added). It does not state that *only* such persons are "aggrieved" for purposes of § 605. One need only look to the second part of this subsection to realize that the word "include" renders the subsequent words non-limiting:

> [I]n the case of a violation of paragraph (4) of subsection (e) of this section, [the term 'any person aggrieved'] shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

Paragraph (4) of subsection (e) provides that:

> Any person who manufactures, assembles, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to

> know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each device shall be deemed a separate violation.

No one could seriously argue that persons who are engaged solely in the *unlawful* manufacture or distribution of such equipment are thereby automatically immune from liability under § 605(e)(4). It stands to reason, therefore, that persons other than those with "proprietary rights in the intercepted communication" may also be able to state a claim under § 605.[5]

C. VIOLATION OF § 605

Plaintiff argues that defendant violated the first and third sentences of § 605(a). Defendant argues that it did not "intercept" a signal in which plaintiff had an interest and, therefore, cannot be held liable under § 605(a). There can, however, be a violation of § 605(a) in the context of a cable television communication even if the violator receives a communication signal that it is legally entitled to receive, if it

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[5] Furthermore, with all due respect to the *Lynstalder* court, this Court is not convinced that National Satellite did not have a proprietary interest in the communication of the Event sent by defendant to Melody Lane Lounge. For example, one might argue that, since plaintiff had the exclusive right to send the Event signal to commercial establishments, a proprietary interest of some sort on the part of plaintiff arose at the moment when defendant transmitted the Event to Melody Lane Lounge.

then diverts or sends the communication to an entity that is not entitled to the communication.[6] The first sentence of § 605(a) provides:

> Except as authorized by chapter 119, Title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his

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[6] This Court is not unaware of holdings by the Sixth Circuit that a violation of § 605 requires *both* an interception and a divulgence of a protected communication, and that one authorized to receive the communication cannot have "intercepted" it. *See Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740, 741 (6th Cir.1973), and *Bufalino v. Michigan Bell Telephone Co.*, 404 F.2d 1023, 1027 (6th Cir.1968). Those cases, however, were decided before cable television became the subject of § 605 litigation and involved the issue of whether a party to a telephone conversation can be liable under § 605 if that party divulges the contents of the conversation to another. This Court holds that those cases are easily distinguishable from the one at bar and do not necessarily require a decision in defendant's favor simply because the defendant did not physically receive an unauthorized signal, or because the physical signal sent by plaintiff was not the one received by Melody Lane Lounge. *See also Kingvision Pay Per View, Ltd. v. Williams* and *That's Entertainment, Inc. v. J.P.T., Inc., infra.* This Court also notes that other courts bound by Sixth Circuit law have more recently held, in similar cable piracy cases, that § 605 can be violated by *either* an interception *or* a divulgence of a protected communication. *See, e.g., United States v. Westbrook*, 502 F.Supp. 588, 589 (E.D.Mich.1980); *Cox Cable Cleveland Area, Inc. v. King*, 582 F.Supp. 376, 379 (N.D.Ohio 1983). Finally, it has been suggested that one authorized to receive a cable television signal at one destination might be said to "intercept" it by diverting it to an unauthorized destination. *See Kingvision Pay Per View, Ltd. v. Duermeier*, 24 F.Supp.2d 1179, 1185 n. 3 (D.Kan.1998). Here, defendant was authorized to receive the signal and send it to residential customers, but then "diverted" it to Melody Lane Lounge, an unauthorized destination.

> agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority.

This section has been interpreted as designed specifically to regulate the conduct of legitimate communications personnel with respect to the divulgence or publication of wire or radio transmissions. *See, e.g., Kingvision Pay Per View, Ltd. v. Duermeier*, 24 F.Supp.2d 1179, 1183 (D.Kan.1998); *Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc.*, 954 F.Supp. 1046, 1052 (E.D.Pa.1997); *International Cablevision, Inc. v. Sykes*, 75 F.3d 123, at 131 n. 4 (2d Cir.1996); *National Basketball Assoc. v. Sports Team Analysis and Tracking Systems, Inc.*, 939 F.Supp. 1071, 1113 (S.D.N.Y.1996); *United States v. Norris*, 88 F.3d 462, 465 (7th Cir.1996); and *International Cablevision, Inc. v. Noel*, 859 F.Supp. 69, 75 (W.D.N.Y.1994). Defendant transmitted the Event to Melody Lane Lounge through an unauthorized channel of transmission (defendant was not authorized to transmit the Event to commercial establishments). Defendant also assisted Melody Lane Lounge in receiving the Event through an unauthorized channel of reception (Melody Lane Lounge was not authorized to receive the Event except by contract with plaintiff).

The third sentence of § 605(a) provides:

> No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

Defendant assisted in the receiving of the Event by Melody Lane Lounge. No one disputes that defendant was "not entitled" to assist Melody Lane Lounge in that reception, or that Melody Lane Lounge was "not entitled" to that reception. Other courts have found commercial establishments to have violated the above provision of § 605 under similar circumstances. *See, e.g., Kingvision Pay Per View, Ltd. v. Williams*, 1 F.Supp.2d 1481 (S.D.Ga.1998) (commercial establishment that received a boxing match at the residential rate from satellite service provider and exhibited the match to its patrons, held liable under § 605 to owner of exclusive rights to distribute the match to commercial establishments, even if the establishment did not "illegally intercept[]" the signal); *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F.Supp. 995 (D.Md.1993) (commercial establishment that diverted a cable signal of a boxing match from a residence to its business premises and exhibited the match to its patrons, held liable under § 605 to owner of exclusive rights to distribute the match to commercial establishments, whether or not there was an actual "interception" of the boxing match signal; court, however, concluded that there was an "interception" within the meaning of § 605 under the facts of the case). Defendant's assistance in the reception of the signal by Melody Lane Lounge, therefore, was also a violation of § 605. Furthermore, plaintiff suffered harm as a direct result of that violation. *See Kingvision Pay Per View, Ltd. v. Williams* and *That's Entertainment, Inc. v. J.P.T., Inc., supra.* The Court concludes, therefore, that defendant violated § 605 and is liable to plaintiff for damages, attorney fees, and costs. The amount of damages, however, cannot be determined as a matter of law at this stage because there are material fact issues that affect the amount of damages, including what support there is for the amount of statutory damages plaintiff is demanding and whether defendant's actions were willful.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment (Doc. No. 38) is DENIED and plaintiff's motion for summary judgment (Doc. No. 37) is GRANTED in part as to the issue of liability. The case will proceed toward trial on the issues relating to damages.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[December 13, 1999]

MEMORANDUM OPINION

Plaintiff National Satellite Sports, Inc. ("National") brought this case under 47 U.S.C. § 605 alleging a violation of the statute by defendants Time Warner Entertainment Co. ("TWE") and Melody Lane Lounge ("MLL"), a commercial establishment in Perry, Ohio. Plaintiff had the exclusive license to transmit the December 14, 1996 "Bowe-Golota Boxing Match" (the "Event") to commercial establishments; defendant had the authority to transmit to residential customers. Through TWE, the Melody Lane Lounge received a signal for the Event and played the Event for its patrons on December 14, 1996. The Melody Lane Lounge has since settled with plaintiff but TWE remained in the suit. This Court previously determined through summary judgment that National is entitled to an award of damages against TWE pursuant to 42 U.S.C. § 605 ("Piracy Act"); familiarity with this ruling is assumed. National has elected to receive

statutory, rather than actual, damages and has requested enhancement of those damages by the statutory multiplier. National also seeks a full award of its attorney fees and costs in pursuing this claim; but this issue was deferred until after trial.

Plaintiff seeks statutory damages pursuant to 47 U.S.C. § 605(e)(3)(C)(i)(II) as well as enhanced damages for willfulness under § 605(e)(3)(C)(ii). Plaintiff estimated its approximate statutory damages as follows: $987.50 in lost profits; $1,700 for expenses in investigating and policing piracy in Northeast Ohio; $1,700 in administrative fees necessary to identify defendants as pirates; $5,000 in lost goodwill of customers.

Findings of Fact

1.) TWE's carriage agreement provides: "Affiliate shall not authorize or permit the exhibition of the channels in non-residential establishments . . . [including] commercial establishments such as restaurants and bars." TWE was and has always been prohibited from providing pay-per-view access to commercial establishments under the terms of its carriage agreement.

2.) On or about February 7, 1996, a TWE employee, Ken Sovacool (since terminated by TWE), submitted a work order to TWE for an upgrade in cable service on Account No. 4613-05 [hereinafter referred to as "The Account"], which served Melody Lane Lounge, located at 4329 Lincoln Way E., Massillon, Ohio, and which at the time was listed on the work order in the name of Gust Eliadis.

3.) MLL was housed in a single story, stand alone brick structure, sporting a large plate glass window with neon beer signs in the window, along with a large exterior sign. It is obvious MLL is a commercial establishment.

4.) Through the front entrance, situated in the center of MLL, there is a large, circular bar, with 30 stools arranged around it. One television set was located above the bar and one above the booths in the rear of the bar.

5.) The upgrade of cable service was system wide and included a service which would allow two-way communication so that a subscriber could order pay-per-view movies and events, which were supposed to have been available only at residences. Mr. Sovacool did not discuss with MLL what services it was entitled to receive as a commercial establishment.

6.) The work order for the Account states that the account would receive a free 60-day special introductory package. Mr. Sovacool provided Melody Lane Lounge with a free pay-per-view movie, and a 60-day free special introductory package.

7.) The work order in Mr. Sovacool's possession at the time the installation was performed listed the Account as a residential account. This enabled the Account to order pay-per-view events at MLL. TWE does not employ different forms for its residential as opposed to its commercial customers. The only difference between a residential and commercial work order would be the information typed in to the appropriate space or line.

8.) After a TWE technician/sales representative makes a sale and installs proper boxes at an establishment, he or she calls in to the Time Warner Cable head-in center and tells the center what has been ordered. The center activates the service, which gives "personality" to the boxes by determining which services are received at the establishment. After calling the head-in center, the technician checks the boxes and reception to make sure that the customer is receiving the services ordered. The technician does not necessarily check to make

sure that the customer is receiving services that were not ordered.

9.) After he upgraded service at MLL, Mr. Sovacool did not check to make sure that MLL was not receiving services that it was not supposed to receive. Rather, he only checked to make sure that it was properly receiving the services that were listed on the work order.

10.) TWE trains the salespeople and installers to confirm the type of cable services being received at a location, to compare those services to TWE's records and to request correction if any is needed.

11.) Under TWE's policy and procedure, Mr. Sovacool should have reported to TWE that the service address was a commercial establishment instead of a residence. If he reported the error, the change should have been processed.

12.) No correction was made on the Account and the address remained on TWE's service system as a residential account.

13.) There is no evidence as to whether Mr. Sovacool willfully or accidentally failed to correct the account status. There is no proof that Mr. Sovacool noticed the inaccurate designation on the work order.

14.) On December 14, 1996, a championship boxing match took place between Riddick Bowe and Andrew Golota (the "Event"). The closed-circuit broadcast of the Event was not intended for the use of the general public. In Ohio, the closed-circuit broadcast of the Event could only be legally exhibited in a commercial establishment if said establishment was contractually authorized to do so by National.

15.) Commercial establishments which contracted with the plaintiff were required to pay to the plaintiff a sublicense fee to receive the Event. The sublicense fee was based on the product of the seating capacity of the establishment as

determined by the local fire or health department and a constant ($12.50). In addition, a $50.00 technical authorization fee was charged to each commercial establishment, which contracted with plaintiff to receive the Event. This fee could have been adjusted depending on other factors, such as the number of television sets on the premises, and the number of patrons attending. Based upon information obtained during discovery, it would have cost MLL nine hundred eighty seven dollars and fifty cents ($987.50) to acquire the Event from plaintiff on December 14, 1996.

16.) Plaintiff employed investigators to visit commercial establishments for the purpose of enforcing its distribution rights to the Event. Both National and TWE used investigators to visit commercial establishments on the night of the Event. This is a regular practice by both entities. On the night of the Event, plaintiff employed several agencies in Ohio that utilized the services of 13 investigators, who canvassed three counties, including the city of Massillon, Ohio, for which plaintiff paid a combined fee of $1,785.

17.) At the time the investigator entered MLL, there were approximately twenty three (23) patrons in the establishment. Had the same 23 persons instead purchased the Event individually through their cable provider, it would have collectively cost nine hundred eighteen dollars and eighty-five cents ($918.85) ($39.95 x 23).

18.) In this case, MLL did not contract with the plaintiff and did not pay the plaintiff a fee to exhibit the Event. Instead, it obtained the Event through a residential signal that TWE provided to it for a fee of thirty nine dollars and 95/100 cents ($39.95). MLL transmitted, divulged and published said Event to the patrons within MLL without the authorization of National.

19.) Defendant MLL did not advertise its display of the Event, nor did it charge a cover to its patrons for admission to view the telecast. MLL ordered the Event in response to demands from its customers on the same night the Event was broadcast. A bartender at MLL was able, by remote control or by punching numbers into a cable box, to order the Event and allow the patrons to watch the Event. Mr. Eliadis would not have purchased the Event if he had been given the opportunity to obtain a sublicense for $987.50.

20.) In addition, TWE also enabled, sold and provided an entity known as the Polish Club, a commercial establishment located at 1605 Henry Avenue, S.W., Canton, Ohio, with the Event. Although the Polish Club has a bar capacity of 30 to 40 people, only 4 people watched the Event.

21.) In January of 1997, plaintiff's general counsel corresponded with MLL advising it that an investigator in its employ had observed the unauthorized display of the Event at its establishment.

22.) Thereafter, on or about February 18, 1998, Mr. Eliadis provided a copy of his billing statement demonstrating that MLL had acquired the Event from Time Warner Cable.

23.) On December 17, 1997, TWE ran a "Pay-per-view History Inquiry" on the Account, which identified eleven pay-per-view events as being ordered by the Account which, as of the date of the inquiry, was in the name of APK, Inc., dba Melody Lane Lounge.

24.) Between 1995 and March 14, 1998, The Account purchased from TWE the "Cavs/Indians" package at the commercial rate of $30.00/month.

25.) TWE billing records for MLL indicate that it was receiving Cavs/Indians service which is designated as a

"commercial" service. MLL had been receiving this service since at least August of 1995.

26.) Despite being recorded as a residential account from February 15, 1996 (immediately after Mr. Sovacool completed the work order) onward MLL was charged by TWE at the commercial rate of $30.00/month for the "Cavs/Indians" package. Residential subscribers to the "Cavs/Indians" package paid $6.95 per month.

27.) National agreed to settle its claim against MLL on or about June 9, 1998, for $250.00.

28.) TWE pays technician sales representatives such as Mr. Sovacool strictly on a commission basis. These employees have little incentive to report the erroneous provision of premium or pay-per-view service to commercial establishments.

29.) TWE customarily places a "trap" on all of its commercial customers to ensure that they do not receive services for which they are not eligible. TWE also performs visual inspections of those traps to ensure they are operational.

30.) TWE's computerized billing and account system, which is run by a third party vendor, did not recognize inconsistencies within an account, such as billing a "residence" for a commercial package or allowing a commercial package subscriber to get pay-per-view. The system did not electronically alert TWE of the contradiction or otherwise limit what services MLL could order. Consequently, a human error in data processing or account coding can go unnoticed.

31.) TWE does not maintain a running list of commercial establishments that have a history of piracy. However, once it is discovered that a commercial establishment is receiving signals it is not eligible to receive, TWE corrects the listing in its billing system and discontinues the erroneous service.

32.) To properly and promptly verify, track and maintain the piracy information, plaintiff maintains a full-time staff of assistants and secretaries who verify the accuracy of the information received from investigators, track the information received to determine whether the particular persons involved have pirated past Events, and then maintain the information in cross-referenced form so that the information may be recalled for any and all necessary purposes.

33.) Piracy of programming poses a serious threat to the business interests of National, whose income depends primarily on its status as an exclusive licensee. Piracy also poses a threat to the goodwill of National's customers, who are less willing to pay for services if their competition is able to get them free through piracy. Plaintiff has suffered damage to its reputation and goodwill.

34.) National Satellite paid approximately 40 to 50 percent of its net profits to the licenser of the Event.

Findings of Law

1.) Because plaintiff's damages would be difficult to prove in this matter, it is appropriate for plaintiff to elect to receive statutory damages in this case. *See generally* 17 U.S.C. § 504(c)(l) (the Copyright Act). *See American Television and Communications Corp. v. Floken, Ltd.*, 629 F. Supp. 1462, 1466 (M.D. Fla. 1986) (value of business investment, business opportunities and goodwill); *Cox Cable Cleveland Area, Inc. v. King*, 582 F. Supp. 376, 381 (E.D. Ohio 1983) (losses from loss of future patrons of unauthorized broadcasts); *Quincy Cable Systems Inc. v. Sully's Bar, Inc.*, 640 F. Supp. 1159, 1161 (damage to goodwill and reputation).

2.) "Willful" within the meaning of this subdivision of the statute means a "disregard for the governing statute and an indifference to its requirements." In *ON/TV of Chicago v.*

Julien, 763 F.2d 839, 844 (7th Cir. 1985) (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 (1985)). Knowing or reckless disregard and indifference may be actual or constructive, and may be inferred from the defendant's conduct. *Peer Int'l. Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995). "Reckless disregard of the . . . holder's right (rather than actual knowledge of infringement) suffices to warrant an award of the enhanced damages." *Id.* (quoting *NAS Import. Corp. v. Chenson Ent. Inc.*, 968 F.2d 250, 252 (2d Cir. 1992)); *Fitzgerald Publishing Co., Inc. v. Baylor Publishing Co., Inc.*, 807 F.2d 1110, 1115 (2d Cir. 1986), *aff'd*, 862 F.2d 304 (1988); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 851 (11th Cir. 1990).

Disposition

Reflecting upon the above stated findings of fact, the Court finds that damages amount to $4,500. The evidence was insufficient to support a finding of willfulness however. There is no indication of a pattern of selling these unauthorized events to commercial establishments, nor was there any indication that TWE sold this particular event intentionally. Of course, a finding of willfulness under § 605 can be predicated merely on a "disregard for the governing statute and an indifference to its requirements." *ON/TV of Chicago v. Julien*, 763 F.2d 839, 844 (7th Cir. 1985) (quoting *Transworld Airlines, Inc. v. Thurston*, 469 U.S. 111, 127 (1985)). However, plaintiff is unable to point the Court to any case law whose facts support a finding of willfulness in this case. TWE's billing system fails to detect inconsistencies that, if detected, could aid in the protection of National Satellites' rights under its license. However, these errors seem to have led to only two discrepancies in Northeast Ohio out of possibly thousands of customers. TWE's practices are sloppy

and perhaps negligent, but they do not evince reckless disregard for National's rights. The Court wonders, however, whether TWE would have been able to correct its computer system for less money than it cost it to litigate this case.

Plaintiff National Satellite Sports, Inc. shall receive judgment in the amount of $4,500 plus costs from defendant Time Warner Entertainment, Inc. Plaintiff has leave until January 6, 2000 to submit an attorney fee application.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[December 13, 1999]

JUDGMENT

For the reasons set forth in the contemporaneously filed Memorandum Opinion, judgment is hereby entered in favor of plaintiff National Satellite Sports, Inc. against defendant Time Warner Entertainment Co. in the amount of $4,500 and costs. Plaintiff shall have leave until January 6, 2000 to submit an attorney fee application.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[March 23, 2000]

MEMORANDUM OPINION

The plaintiff, the prevailing party in this case, seeks an award of attorney fees and costs in the sum of $37,842.77.[1] (See Docket #96). The defendant, Time Warner Entertainment Co., has suffered a verdict against it for the sum of $4,500.00. The plaintiff's motion is anchored in the statutory right to an award of attorney fees in this case as set forth in 47 U.S.C. §§ 553(c)(2)(C) and 605(e)(3)(B)(iii).

[1] Lead counsel for the plaintiff, Michael D. Slodov, indicated in his application that he had spent 184.25 hours on the case and that an associate, James Oh, devoted an additional 7 hours at the time of the trial on the issue of damages. The total claimed for fees is the sum of $22,875.00. The total hours claimed (i.e., 184.25) is less than the itemization on the application that adds to 189 hours. Rather than attempt to recalculate the time devoted to the case by Slodov and Oh, the Court will consider the Slodov application to be for total fees in the sum of $22,875.00.

The defendant has opposed the application on the premise that the plaintiff recovered only nominal judgment and as a consequence the Court should follow the teachings of *Farrar v. Hobby*, 506 U.S. 103 (1992), and *TCI of Illinois, Inc. v. Carpenter*, 849 F.Supp. 326 (N.D. Ill. 1994) and award low fees or no fees at all. The Court disagrees with the defendant's description of the judgment. A judgment for $4,500 does not meet the definition of a "nominal amount" even if the sum appears insignificant to the defendant. A review of the docket reflects a hard fought case between the plaintiff and Time Warner. The docket entries now number 102. The Court conducted a trial on the issue of damages that produced a transcript of 166 pages. The Court entered six separate orders dealing with the substantive nature of the case.

Plaintiff's lead counsel, Michael D. Slodov, seeks an award of $22,875.00 in attorney fees.[2] An additional award of attorney fees coupled with a request for paralegal expense has been filed by Attorney Marcus Corwin of Florida, in the amount of $10,033.25. Finally, a request for costs in the sum of $4,934.97 is included in the application.

After reviewing the application and considering that the major work before the Court on behalf of the plaintiff was performed by Mr. Slodov, and the additional fact that Attorney Cowin was not listed as counsel of record in the case, but rather has an ownership interest in the plaintiff corporation, the Court declines to award fees to the Florida counsel.[3]

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[2] Mr. Slodov requests an hourly rate of $125. The defendant does not dispute that hourly rate and the Court finds that such an hourly rate for Mr. Slodov is justified. He was persistent in his devotion to the interests of his client and he was required to do an extraordinary amount of work in which appeared, at the outset, as a simple case.

[3] If the Court were to compute the attorney fees based upon a determination that there had been a duplication of effort by the lawyers seeking attorney fees on behalf of the plaintiff and also that the fee application was

Consequently, the plaintiff is granted attorney fees in the sum of $22,875.00.

The cost bill is summarized in the application follows:

A. Deposition	$1,459.05
B. Experts	0.00
C. Witness Fees	1,767.50
D. Other	1,707.42
Total	$4,933.97

The itemization of the costs is set forth in Exhibit B attached to the application and a copy is attached hereto as Appendix 1. The defendant challenges most, if not all, of the requested costs. One of the requested claims is for Westlaw research in a total sum of $1,182.60. The Court is of the view that the attorney fee award based on the number of hours times the allowable rate incorporates whatever research tools the prevailing party chooses to use and the cost of outside research is captured with the attorney hourly rate and so the research cost is not allowed.[4] The Court also strikes the cost of copying the supplemental brief in the sum of $236.72. The disallowed costs total $1,419.32 and the rest of the cost bill is allowed for a total allowance of $3,514.65.

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excessive in terms of the hourly rate sought by Florida counsel, the Court would reduce the application by a factor of 30%. The amount sought by Attorney Slodov is just slightly less than 70% of the total application for attorney fees, i.e., 69.5% of the fee application.

[4] Furthermore, the Court notes that there is no way to evaluate, on the material submitted, whether the charged Westlaw time related in whole or in part to the case at hand.

The Court will publish a separate order granting the application for attorney fees and costs in the total sum of $26,389.65.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. 5:97CV3096

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

v.

ELIADIS, INC., ET AL.,
Defendants.

[March 23, 2000]

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion, filed contemporaneously with this Order, the plaintiff is granted judgment against the defendant Time Warner Entertainment Company for attorney fees in the sum of $22,875.00 plus costs in the sum of $3,514.65 for a total of $26,389.65.

IT IS SO ORDERED.

/s/ David D. Dowd
DAVID D. DOWD, JR.
U.S. District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-3013 & 00-3437

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff-Appellee,

v.

ELIADIS, INC., D/B/A MELODY LANE LOUNGE, ET AL.,
Defendants,

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
D/B/A TIME WARNER CABLE,
Defendant-Appellant.

[August 9, 2001]

Before: JONES, SILER, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX H

[1]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NATIONAL SATELLITE SPORTS, INC.,
Plaintiff,

vs.

LYNSTALDER, INC., et al.,
Defendants.

Case No. 5:97CV2039

Youngstown, Ohio
Monday, July 13, 1998
8:15 a.m.

TRANSCRIPT OF ORAL ARGUMENT
ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE JAMES D. THOMAS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

[2]

THE COURT: Good morning. Let the record reflect the case is National Satellite versus Lynstalder, Inc., et al., Case Number 97CV2039.

* * * * *

[32]

* * * * *

THE COURT: * * * * *

Let me state for the record that I've considered the [33] motion which was filed at Docket 46. It was filed on June 5, 1998. And I've considered plaintiff's memorandum in opposition which is at Docket Number 52, filed on July 2, and the defendant's reply. I've also considered the arguments that have been advanced here this morning by all parties.

This is, in part, some context before I issue the ruling from the bench here today.

It is not my practice to issue rulings on the day of the bench trial and I apologize to both parties for this. At the same time, the circumstances of this case dictated me addressing the motion this morning.

And I don't need to go over the course of this case or the adversarial nature between the remaining two parties because it's been somewhat intense, requiring a lot of Court action.

This case was set for trial by agreement of the parties back, I believe, in March at Docket Number 28. We've all been aware of the trial date. We've all pushed ourselves back up to this point.

For the reasons that I'm going to state on the record, I'm going to grant the motion for summary judgment and dismiss the claims by plaintiff against the defendant.

And I'm going to articulate my reasons on the record because I won't be issuing a written memorandum order, and [34] this will be your stated reasons. And I'm sure both parties will more than likely have a disagreement over everything I say, pretty much, and you can take it up to the Sixth Circuit and they can tell us whether I was right or wrong.

I have an outline of what I'm going to try to articulate, my reasons.

First, two procedural notes. I want to indicate for the record that this ruling assumes that any reader of the transcript of this ruling is familiar with the pleadings outlined here in the hearing conducted earlier today. In short, I won't be giving any detailed discussion of the background of facts or the arguments unless noted here.

The reader's familiarity with both, i.e. the background and the arguments, is assumed by me at this point.

Because of this, I view this decision as expressly limited to the facts and circumstances presented in this case and any citation of this decision by counsel is disfavored by me except for the purpose of establishing res judicata, estoppel or law of the case. And I would ask you to compare that to Rule 24 of the Sixth Circuit Court of Appeals. This decision is expressly limited to the facts and circumstances of this case.

Second, because this is going to be my statement of findings, I'll note that this matter is before me pursuant to the consent jurisdiction of the United States Magistrate [35] Judge under 28 United States Code Section 636(c). Any appeal of this decision, therefore, is to the United States Court of Appeals.

With regard to the ruling, plaintiff has failed to state a claim pursuant to the terms of the contracts at issue in this case as well as 47 United States Code Section 605.

There are two bases for the decision. That's the contractual bar and the language or the provision of 47 U.S.C. Section 605.

And first, the contractual bar. As outlined in the pleadings, the December 8, 1995 Closed Circuit Television License Agreement between Time Warner Sports and Joe Hand Promotions, Inc. establishes several important, I believe, undisputed facts in this case.

First, under paragraphs 17(a) and (b), the Television License Agreement dated December 8, 1995 incorporates the terms and conditions of Exhibit A and B to that agreement.

Exhibit A is the terms to be included in any closed circuit television sublicense agreement. Exhibit B are standard terms and conditions for that agreement, i.e., the TVLA agreement, and any sublicense agreements.

This is a fully integrated agreement. Paragraph 22 of Exhibit B of the Television License Agreement provides for such. That paragraph further provides that any [36] modifications must be in writing, signed by both parties.

And for purposes of the Television License Agreement of Time Warner Sports and Joe Hand Promotions, paragraph 11(b) indicates or provides that Joe Hand was responsible for creating a separate encoded signal in accordance with Section 2 of that agreement which defines the Events.

There is no dispute on this issue.

Paragraph 14(e) of the Television Licensing Agreement provides for the enforcement of unauthorized display of the closed circuit television feed. That also provides that Joe Hand Promotions could not assert any piracy claim without prior notice.

It specifically provides that a sublicensee has no rights to enforceability, quote, "It being understood that your sublicensee shall have no right to commence or settle any claim or litigation hereunder."

The other relevant agreement is the March 12, 1996 Closed Circuit Television Agreement entered into between Joe Hand Promotions and National Satellite Sports.

That agreement at paragraph 7 provides that there is no right to a piracy action to be pursued by National Satellite. Mr. Corwin's affidavit filed in opposition to the motion for summary judgment at paragraph 4 specifically concedes this point.

Plaintiff's effort to overcome the language of the [37] contract does not create a material issue of fact for trial.

To the extent plaintiff relies on Parol Evidence, that evidence is not proper under Rule 56(e) in light of the integrated

agreements identified above, the March 12 agreement and the December 8 agreement.

Even considering that evidence, the plaintiff's claims fail to establish a right to proceed with a piracy action under the contracts.

Any subsequent agreement between Joe Hand and plaintiff cannot overcome or amend or modify the terms as between Time Warner Sports and Joe Hand. As noted earlier, any amendments or modifications must be in writing.

Further, I reviewed the exhibits referenced in that same paragraph 4 of Mr. Corwin's affidavit regarding subsequent modifications, oral modifications, and I find them not to create an issue of fact given the Parol Evidence Rule and also that these letters were all entered into after the date of the alleged fight in this case as well as the fact that they are between — appear to be between Joe Hand and National Satellite, and again, cannot amend the agreement between Time Warner Sports and Joe Hand.

With regard to Section 605 statutory language, the statute defines a person aggrieved as a person who is entitled to file suit for a violation under 47 U.S. Code [38] Section 605(a), which includes any person with propriety rights in the intercepted communication.

In this case, I don't think there is any dispute that the communication at issue was the HBO network feed and not the closed circuit television feed which was what Joe Hand and then subsequently National Satellite had an interest in.

And based upon that, those undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person.

Those are the reasons for the Court's ruling on the motion for summary judgment, and I will make only two comments regarding the decision.

First, that one may, I, myself — the question is what then is National Satellite's remedy for what is admitted to be an unauthorized and nonlicensed transmission? And I say "admitted" because the request for admissions that were submitted by National Satellite to defendant Time Warner specifically asked Time Warner to admit or deny that it was — I think it was in request number one, whether they had authority for a license to transmit. And it was admitted — I thought it was admitted that they did not.

But in any event, even using Mr. Lefkowitz's admission that it was a mistake or negligence, my reaction is what is National Satellite's remedy?

[39] Well, from what I can tell from the case and what is argument before the Court in a motion to amend the complaint to add Time Warner in a breach of contract claim without seeking to add Joe Hand Promotions, it appears to me that that is indeed the remedy for a person in National Satellite's position, is to file a breach of contract claim against Joe Hand Promotions and then also bringing in Time Warner.

That was not the claim I was going to allow to be pursued at the time it was brought before this case, and I've already set forth my decision with respect to the motion to amend in this case, but it doesn't appear to me that that precludes a remedy for National Satellite.

And second is a procedural comment. The easiest thing for me to have done today would be to hear all the evidence. The parties are all here. Everyone is ready to go. Counsel have done a good job in putting everything together for trial.

But that would be a disservice to summary judgment mechanisms of the Federal Rules of Civil Procedure and also to contract language that appears to me to be fairly clear. And I have made a decision to grant the motion for summary

judgment and let the parties go from there, to argue what they may from here on out.

I will enter a final judgment in the next couple days [40] incorporating the ruling on the motion for summary judgment and the stipulated dismissal with respect to Coach's. And with that, that will conclude the matter.

* * * * *

APPENDIX I

Section 705 of the Communications Act of 1934, 47 U.S.C. § 605, provides as follows:

§ 605. Unauthorized publication or use of communications

(a) Practices prohibited

Except as authorized by chapter 119, title 18, no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, (1) to any person other than the addressee, his agent, or attorney, (2) to a person employed or authorized to forward such communication to its destination, (3) to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, (4) to the master of a ship under whom he is serving, (5) in response to a subpena issued by a court of competent jurisdiction, or (6) on demand of other lawful authority. No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. No person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of such communication (or any part thereof) knowing that such communication was intercepted, shall divulge or publish the

existence, contents, substance, purport, effect, or meaning of such communication (or any part thereof) or use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto. This section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication which is transmitted by any station for the use of the general public, which relates to ships, aircraft, vehicles, or persons in distress, or which is transmitted by an amateur radio station operator or by a citizens band radio operator.

(b) Exceptions

The provisions of subsection (a) of this section shall not apply to the interception or receipt by any individual, or the assisting (including the manufacture or sale) of such interception or receipt, of any satellite cable programming for private viewing if —

(1) the programming involved is not encrypted; and

(2)(A) a marketing system is not established under which —

(i) an agent or agents have been lawfully designated for the purpose of authorizing private viewing by individuals, and

(ii) such authorization is available to the individual involved from the appropriate agent or agents; or

(B) a marketing system described in subparagraph (A) is established and the individuals receiving such programming has obtained authorization for private viewing under that system.

(c) Scrambling of Public Broadcasting Service programming

No person shall encrypt or continue to encrypt satellite delivered programs included in the National Program Service of the Public Broadcasting Service and intended for public viewing by retransmission by television broadcast stations; except that as long as at least one unencrypted satellite transmission of any program subject to this subsection is provided, this subsection shall not prohibit additional encrypted satellite transmissions of the same program.

(d) Definitions

For purposes of this section —

(1) the term "satellite cable programming" means video programming which is transmitted via satellite and which is primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers;

(2) the term "agent", with respect to any person, includes an employee of such person;

(3) the term "encrypt", when used with respect to satellite cable programming, means to transmit such programming in a form whereby the aural and visual characteristics (or both) are modified or altered for the purpose of preventing the unauthorized receipt of such programming by persons without authorized equipment which is designed to eliminate the effects of such modification or alteration;

(4) the term "private viewing" means the viewing for private use in an individual's dwelling unit by means of equipment, owned or operated by such individual, capable of receiving satellite cable programming directly from a satellite;

(5) the term "private financial gain" shall not include the gain resulting to any individual for the private use in such individual's dwelling unit of any programming for which the individual has not obtained authorization for that use; and

(6) the term "any person aggrieved" shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection (e) of this section, shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming.

(e) Penalties; civil actions; remedies; attorney's fees and costs; computation of damages; regulation by State and local authorities

(1) Any person who willfully violates subsection (a) of this section shall be fined not more than $2,000 or imprisoned for not more than 6 months, or both.

(2) Any person who violates subsection (a) of this section willfully and for purposes of direct or indirect commercial advantage or private financial gain shall be fined not more than $50,000 or imprisoned for not more than 2 years, or both, for the first such conviction and shall be fined not more than $100,000 or imprisoned for not more than 5 years, or both, for any subsequent conviction.

(3)(A) Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of this subsection may bring a civil action in a United States district court or in any other court of competent jurisdiction.

(B) The court —

(i) may grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations of subsection (a) of this section;

(ii) may award damages as described in subparagraph (C); and

(iii) shall direct the recovery of full costs, including awarding reasonable attorneys' fees to an aggrieved party who prevails.

(C)(i) Damages awarded by any court under this section shall be computed, at the election of the aggrieved party, in accordance with either of the following subclauses;

(I) the party aggrieved may recover the actual damages suffered by him as a result of the violation and any profits of the violator that are attributable to the violation which are not taken into account in computing the actual damages; in determining the violator's profits, the party aggrieved shall be required to prove only the violator's gross revenue, and the violator shall be required to prove his deductible expenses and the elements of profit attributable to factors other than the violation; or

(II) the party aggrieved may recover an award of statutory damages for each violation of subsection (a) of this section involved in the action in a sum of not less than $1,000 or more than $10,000, as the court considers just, and for each violation of paragraph (4) of this subsection involved in the action an aggrieved party may recover statutory damages in a sum not less than $10,000, or more than $100,000, as the court considers just.

(ii) In any case in which the court finds that the violation was committed willfully and for purposes of direct or indirect commercial advantage or private financial gain, the court in

its discretion may increase the award of damages, whether actual or statutory, by an amount of not more than $100,000 for each violation of subsection (a) of this section.

(iii) In any case where the court finds that the violator was not aware and had no reason to believe that his acts constituted a violation of this section, the court in its discretion may reduce the award of damages to a sum of not less than $250.

(4) Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section, shall be fined not more than $500,000 for each violation, or imprisoned for not more than 5 years for each violation, or both. For purposes of all penalties and remedies established for violations of this paragraph, the prohibited activity established herein as it applies to each such device shall be deemed a separate violation.

(5) The penalties under this subsection shall be in addition to those prescribed under any other provision of this subchapter.

(6) Nothing in this subsection shall prevent any State, or political subdivision thereof, from enacting or enforcing any laws with respect to the importation, sale, manufacture, or distribution of equipment by any person with the intent of its use to assist in the interception or receipt of radio communications prohibited by subsection (a) of this section.

(f) Rights, obligations, and liabilities under other laws unaffected

Nothing in this section shall affect any right, obligation, or liability under title 17, any rule, regulation, or order thereunder, or any other applicable Federal, State, or local law.

(g) Universal encryption standard

The Commission shall initiate an inquiry concerning the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing. In conducting such inquiry, the Commission shall take into account —

(1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;

(2) incorporation of technological enhancements, including advanced television formats;

(3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable programming;

(4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable programming, including cable systems and satellite master antenna television systems;

(5) the effect of any such standard on competition in the manufacture of decryption equipment; and

(6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.

(h) Rulemaking for encryption standard

If the Commission finds, based on the information gathered from the inquiry required by subsection (g) of this section,

that a universal encryption standard is necessary and in the public interest, the Commission shall initiate a rulemaking to establish such a standard.

MOTION FILED
JAN 11 2002

(2)

No. 01-866

IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.
D/B/A TIME WARNER CABLE,
Petitioner,

v.

NATIONAL SATELLITE SPORTS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF PETITIONER

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January 11, 2002

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13 pp

IN THE

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NATIONAL SATELLITE SPORTS, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Cable & Telecommunications Association ("NCTA") respectfully requests leave to file a Brief as *Amicus Curiae* in support of the Petitioner. The interest of NCTA as *amicus curiae* is described in the accompanying Brief at pp. 1-2.

Counsel for Petitioner has consented to the filing of the *amicus* brief, and a copy of the letter granting such consent has been lodged with the Court. Counsel for Respondent, however, has not provided consent. Nevertheless, there are good reasons for granting this request for leave to file.

First, NCTA, as the principal trade association representing the cable television industry in the United States, is uniquely familiar with the provisions of 47 U.S.C. § 605, which is the statutory provision applicable to this case. NCTA's Office of Cable Signal Theft assists operators and prosecutors in using 47 U.S.C. § 605, among other available tools, to prevent the

theft and piracy of cable television signals. Its *amicus* brief provides additional observations as to why the alleged conduct in this case is beyond the scope of both the letter and the intent of Section 605.

Second, NCTA's members are familiar with the manner in which pay-per-view programming of the sort involved in this case is distributed to residential and commercial customers and the adverse impact that the Sixth Circuit's decision will have on the distribution of such programming, on cable operators and on consumers.

Respectfully submitted,

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January 11, 2002

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IN THE

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No. 01-866

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D/B/A TIME WARNER CABLE,
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NATIONAL SATELLITE SPORTS, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF FOR THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS

The National Cable & Telecommunications Association ("NCTA") is the principal trade association representing the cable television industry in the United States.[1] Its members include owners and operators of cable television systems serving more than 90 percent of the nation's cable television

[1] Pursuant to Rule 37(6) of the Court, Amicus NCTA states that no counsel for a party in this case authored this brief in whole or in part, and that no entity, other than NCTA, made a monetary contribution to the preparation or submission of the brief.

customers, and owners and operators of more than 200 cable program networks. NCTA's members also include equipment suppliers and providers of other services to the cable industry.

NCTA is a vigorous foe of signal theft and piracy. Its Office of Cable Signal Theft assists operators and prosecutors in using 47 U.S.C. § 605, among other available tools, to prevent such unlawful conduct. But, as shown by the Petition for Certiorari, the conduct in this case is beyond the scope of both the letter and the intent of Section 605. To subject such conduct to the sanctions of Section 605 would have serious adverse effects on NCTA's members.

The Sixth Circuit's decision, if allowed to stand, would bring within the scope of Section 605's severe sanctions and strict liability a wide range of inadvertent breaches of contractual agreements involving established commercial relationships. Program owners often provide their programming via several distributors, and they often limit by contract the persons to whom each of these distributors may offer the programming. Such vertical limits on distribution are common to the provision of audio/visual programming, and they are readily enforceable under the law of contracts.

The effect of the Sixth Circuit's decision is to treat every instance in which a cable operator or other retail distributor mistakenly provides programming to a customer who is in another retailer's exclusive territory as the sort of signal "piracy" for which the additional remedies and sanctions of Section 605 were deemed necessary. It encourages lawsuits in federal courts and imposes excessive costs on NCTA's member companies for inadvertent (and probably unavoidable) errors for which appropriate contractual remedies are available under state law. Moreover, these costs could have the effect of deterring cable operators from offering residential subscribers the sorts of special event programming that are distributed by other sources to commercial establishments.

ARGUMENT

This case involves, at most, a breach by Time Warner Entertainment Company of a contractual agreement limiting its right to distribute a "pay-per-view" telecast of a boxing event to its *residential* cable television customers. Like most cable operators, Time Warner also provides cable service to *commercial* customers, such as hotels, restaurants and taverns. By the terms of their contractual agreements with cable programming networks, cable operators are generally permitted to provide most programming to their residential and commercial customers. But the promoters of some "pay-per-view" events establish two separate distribution chains – one for the provision of the telecast to residential customers and one for distribution to commercial establishments.

Thus, in this case, the promoter of a championship boxing match licensed one company, Viewer's Choice, to distribute the telecast of the match by satellite to cable operators for resale to residential subscribers. It licensed a second company, National Satellite Sports, to distribute a separate satellite feed of the match directly to commercial customers.

Occasionally – and inevitably[2] – when such a dual distribution approach is established, a cable operator will inadvertently allow a commercial subscriber to order and view a pay-per-view event that the operator has the right to sell only to its residential subscribers (at a price that is typically lower than the price established by the distributor to commercial establishments). When this occurs, state contract law generally provides an available and appropriate forum for determining who is liable to whom for how much. But in this case, NSS, the distributor to commercial establishments, has characterized Time Warner's inadvertent provision of the pay-per-view event to a local tavern as a violation of Section

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[2] *See, e.g.*, Petition for a Writ of Certiorari ("Petition") at 27-28.

605, for which NSS is entitled to statutory damages and attorney's fees – and the court below agreed.

1. Section 605 has no applicability to the conduct at issue in this case. The prohibitions of Section 605(a) generally apply to two distinct types of unauthorized activities. The first sentence applies to common carriers and other mere intermediaries whose functions are to transmit communications from the sender to the sender's "addressee." It prohibits such intermediaries (who are themselves authorized to receive and transmit the communications) from divulging or publishing the substance of those communications to persons other than the intended recipients "except through authorized channels of transmission or reception." The remaining provisions of Section 605(a) relate to the *interception* of wire or radio communications by someone who is not authorized to receive them.

The court of appeals correctly recognized that the provisions dealing with unauthorized interception do not apply to the present case. Time Warner was fully authorized to receive the satellite transmission of the pay-per-view event from Viewer's Choice. But the court was wrong to conclude that Time Warner had violated the prohibition, in the first sentence of Section 605(a), against unauthorized disclosure or publication of the contents of a communication by an authorized recipient of that communication.

First of all, as this Court has repeatedly recognized, cable operators are not common carriers – or, as the court of appeals held, mere "intermediaries"[3] – hired by programmers to transmit their programming to viewers.[4] In the exercise of

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[3] *See* Pet. App. at 25a.

[4] *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Leathers v. Medlock*, 499 U.S. 439,

their editorial discretion, cable operators obtain from programmers the right to sell their programming to viewers. The programmer has no relationship, contractual or otherwise, with the viewer. It is merely a supplier – a wholesaler – of a service to be packaged and sold by the cable operator to viewers. Thus, in the present case, the intended recipient – the "addressee" – of the satellite transmission of the pay-per-view event by Viewer's Choice was Time Warner itself.

Time Warner's retransmission of that programming to its customers – including, for better or worse, the Melody Lane Lounge – must be analyzed separately. Section 605(a) is aimed at ensuring that persons *other than* the intended recipients of a wire or radio communication not receive it. Time Warner may not have had the contractual right to sell the programming to the Melody Lane Lounge. But it intended (erroneously) that its transmission be viewed by the Melody Lane Lounge. No intermediary diverted the information to a party other than Time Warner's intended "addressee." Nor did the Melody Lane Lounge intercept a transmission sent to someone else. In short, the erroneous sale of the programming by Time Warner to the Melody Lane Lounge has nothing to do with the conduct encompassed by the letter and intent of Section 605(a).

2. Even if the Sixth Circuit were right that Time Warner had somehow violated the prohibition in the first sentence of Section 605(a) by diverting a transmission from Viewer's Choice to a person other than an intended "addressee," it would still be hard to imagine how *National Satellite Sports* ("NSS") could be an "aggrieved party" entitled to statutory relief for such a violation. NSS was neither the sender nor the intended recipient of the communication from Viewer's Choice that was retransmitted to the Melody Lane Lounge.

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444 (1991); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 629 (1994).

NSS received a separate transmission of the pay-per-view event from the promoter, from a satellite different than the one used by the promoter to provide the event to Viewer's Choice – which it then retransmitted to commercial establishments that purchased its service.

Thus, even if Time Warner were erroneously viewed as a mere carrier hired by Viewer's Choice to transmit its signal only to residential purchasers of the telecast, it would be Viewer's Choice – and not NSS – that had an interest in ensuring that Time Warner did not divert the contents, through unauthorized channels, to the Melody Lane Lounge and other commercial establishments who were not the "addressees" of its transmission. That is the statutory interest protected by the first sentence of Section 605(a). Since NSS had no such interest in the communication at issue, it makes no sense to view NSS as a "person aggrieved" by this alleged violation. As the Petition for Certiorari rightly points out, "Congress could not have intended that strangers to a diverted communication be within the zone of interests protected by the first sentence of Section 605(a), simply because they have some indirect interest in the communication's content."[5]

This is not to say, of course, that Time Warner or other distributors of programming may violate the terms of their contractual licensing agreements with program suppliers with impunity. To the contrary, the very purpose of contract law is to protect the legitimate interests and expectations of parties to an agreement. When parties enter into agreements involving exclusive rights to serve particular customers, they know how to protect themselves contractually against breaches of that exclusivity – and when they have done so, state contract law provides the forum and the remedy for any breaches that may occur. In this case, parties know that inadvertent errors may occur and can contractually provide

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[5] Petition at 24

for payments to account for these occurrences. There is no need to rely on Section 605.

3. Not only are the remedies of Section 605 inapplicable to the conduct alleged in this case and unnecessary to protect any contractual rights that may have been violated. Those remedies would also put cable operators at risk of disproportionate liability whenever they choose to carry programming that they are contractually prohibited from providing to commercial customers.

As explained in the Petition for Certiorari, Section 605 provides for strict liability, statutory damages and attorneys fees[6] – all of which would give distributors like NSS a windfall every time a cable operator inadvertently allowed a commercial establishment to order programming that it lacked the right to sell to such establishments. In the present case, for example, the trial court awarded NSS $4,500 in statutory damages, plus more than $26,000 in attorneys fees and court costs. In contrast, NSS would have received less than $1,000 from the Melody Lane Lounge if the tavern had purchased the pay-per-view program from it instead of from Time Warner. But, as the trial court found, the tavern would *not* have purchased the program from NSS at that commercial rate.[7]

The availability of such an additional windfall in excess of the remedies available under contract law distorts a smoothly operating marketplace for the licensing and distribution of programming. It encourages parties to acquire exclusive distribution rights for commercial establishments, which might not otherwise be profitable, in *hopes* that those rights might be breached and a "gotcha" lawsuit of this type pursued. And it imposes artificial and excessive costs on the distribution of programming by cable operators and others

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[6] *See id.* at 26.

[7] *See* Pet. App. at 49a.

who might be subject to strict liability for such inevitable and inadvertent breaches – costs that could even, in some instances, deter the carriage of such programming. This is a result that, in the end, is harmful not only to cable operators and program providers, but also to consumers. Congress could not have intended it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(3)

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.,
D/B/A TIME WARNER CABLE,

Petitioner,

—v.—

NATIONAL SATELLITE SPORTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT NATIONAL SATELLITE SPORTS, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. When a magistrate judge orally grants summary judgment that a company that, by contract, had rights only to a closed circuit television feed and not to an HBO feed, and indeed was contractually barred from suing for piracy with respect to the HBO feed, lacked standing to sue under 47 U.S.C. § 605(a) for piracy of the HBO feed, and the defendant did not even argue that the action would be barred in the absence of that contractual prohibition, and there is no basis to believe that the magistrate judge would have so held, and any such holding would not have been necessary to the decision, should the company be collaterally estopped from bringing a different lawsuit under 47 U.S.C. § 605(a) against the same defendant for divulging the contents of a different communication when an entirely different contract expressly gave the company the right to seek legal redress for that conduct.

2. Whether a company with a proprietary interest in a communication has standing to bring an action under 47 U.S.C. § 605 against a cable operator that divulged the contents of the communication without authorization and in derogation of that proprietary interest.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent National Satellite Sports, Inc. states that it has no parent corporation nor is there any publicly held company owning ten percent or more of its stock.

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PRELIMINARY STATEMENT

National Satellite Sports, Inc. ("NSS") respectfully asks this Court to deny the petition of Time Warner Entertainment Company, L.P. d/b/a Time Warner Cable ("TW") for a writ of certiorari because the petition does not raise any issue meriting this Court's review.

TW asserts that this appeal presents this Court with an opportunity to resolve a conflict in the Circuits as to whether a district court holding that is based on two alternative grounds is a basis for collateral estoppel as to both grounds. That assertion is incorrect and the unique facts of this case do not squarely present that issue, for several reasons. First, the magistrate judge did not clearly make the alternative holding as to which TW seeks to estop NSS and two other prerequisites of estoppel -- an identity of issues and a full and fair opportunity to be heard -- are not present. TW argues that a magistrate judge in a prior lawsuit orally granted summary judgment that NSS did not have standing under 47 U.S.C. § 605(a) to sue TW for wrongfully transmitting an HBO network feed to a commercial establishment both (a) because TW's own subsidiary's contract that governed NSS' rights to distribute the event to commercial establishments by closed circuit ("CCTV") telecast expressly precluded NSS from bringing a piracy action with respect to the HBO network feed and (b) because 47 U.S.C. § 605 supposedly barred such standing even in the absence of such a contractual bar. However, TW did not even argue in its summary judgment motion in that prior proceeding that NSS would not have had standing to sue for the misuse of the HBO network feed under that statute absent the language of the contract, and the magistrate judge's oral decision does not indicate that he intended to so hold. Indeed, such a holding would have made no sense since NSS' rights derived from that contract and in its absence NSS would not have had any rights at

all. In any event, the most TW could argue is that his decision is unclear on that point.

Moreover, since TW did not even argue for such a holding in that prior lawsuit, NSS did not have a full and fair opportunity to litigate the issue. Furthermore, there is not even close to an identity of issues between that case and this case because NSS' contract in this case is diametrically different from the one in the prior proceeding: the contract here expressly grants NSS the right to pursue piracy claims with respect to all "unauthorized use and exhibition of the telecast," does not distinguish between HBO and CCTV telecasts and does not derive from TW itself. Accordingly, collateral estoppel would be inappropriate here even if, as TW now argues, clear alternative grounds for a trial court decision could be a basis for estoppel as to both grounds.

Beyond that, the "conflict" in the Circuits is on its way to disappearing as most Circuits have already adopted the modern Restatement rule which is correct and consistent with the Sixth Circuit's decision here. Because the only cases cited by TW in support of its contrary position are outdated, dicta, or unpublished decisions, no meaningful conflict exists.

TW's second issue, that it cannot be liable to NSS under 47 U.S.C. § 605, also does not warrant the Court's review. Once again, TW misstates the issue. While TW asserts that it mistransmitted "an entirely separate satellite feed" (TW's petition for writ of certiorari ("P") 3), to a commercial establishment to which NSS was authorized to transmit a communication of the boxing match but TW was not, in fact the signals that NSS and TW received in their respective Ohio facilities both originated from the same initial transmission of the communication, as the Sixth Circuit found below. (Petitioner's Appendix ("PA") 3a). Moreover, the application of § 605 in NSS' favor by the

Sixth Circuit and the district court below are entirely correct and consistent with the language of that statute, its legislative history, and prior decisions of district courts interpreting and applying that statute. As both courts below found, NSS' suit seeks to redress precisely the type of improper divulging of the content of a communication which Congress intended to remedy in the Communications Act. The absence of any contrary judicial authority or legislative history further establishes that this issue is, at best for TW, not ripe for this Court's review.

COUNTER-STATEMENT OF THE CASE

NSS and TW each obtained certain exclusive rights to transmit the broadcast of a December 1996 boxing match between Riddick Bowe and Andrew Golota. NSS' contract gave it the exclusive right to transmit the communication of the boxing match to commercial establishments in Ohio; TW's contract granted it the exclusive right to transmit the communication on a pay-per-view basis to its Ohio residential customers. However, TW erroneously provided the communication to Melody Lane Lounge, an Ohio commercial establishment, through the TW residential pay-per-view service, for a price substantially lower than NSS charged commercial establishments. TW characterizes its misconduct as merely "inadvertent" -- even though § 605 is a strict liability statute -- but, as the Sixth Circuit found: "Time Warner concedes that Sovacool [the TW employee servicing the Melody Lane Lounge account] should have recognized that the Melody Lane Lounge was a commercial establishment and not a residence. The structure of the building, an exterior identification sign, and neon beer signs in the window made this obvious." (PA 4a).

TW now asserts that NSS received the communication of the match via "an entirely separate satellite feed." (P 3). Actually, as the Sixth Circuit found, "the signals that NSS and Time Warner received in their respective Ohio facilities

both originated from the same initial transmission. . . ." (PA 3a).[1] Moreover, TW is bound by the joint "Stipulations of Undisputed Facts" that "Main Events created one signal consisting of both audio and video content, which was transmitted ... from the venue to the transmission station." (Joint Appendix submitted to the Sixth Circuit ("JA") 388); *see also* 16 Wright & Miller, *Federal Practice & Procedure* § 1527 (1990).

NSS thereafter discovered that Melody Lane Lounge received the transmission of the communication of the boxing match from TW. NSS sued Melody Lane Lounge, its owners and TW for violating 47 U.S.C. § 605 ("the Act"). Melody Lane Lounge and its owners settled with NSS. TW and NSS then cross-moved for summary judgment. The district court entered summary judgment in favor of NSS. Following a bench trial on damages, TW appealed to the Sixth Circuit and argued that: 1) collateral estoppel barred NSS' claim; 2) in the alternative, NSS lacked standing under 47 U.S.C. § 605; and 3) in any event, NSS failed to establish a violation of that statute. The Sixth Circuit affirmed the decision of the district court in favor of NSS.

TW argued below that the magistrate judge's oral grant of summary judgment in a prior lawsuit, *National Satellite Sports, Inc. v. Lyndstalder, Inc. d/b/a/ Coach's Corner*, No. 5:97 CV 2039 (N.D. Ohio July 13, 1998) (*"Coach's Corner"*), should collaterally estop NSS from pursuing this litigation. *Coach's Corner* arose from a fact pattern that is only superficially similar. In *Coach's Corner*, Time Warner

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[1] TW's disagreement with this and other factual findings is not an appropriate basis for certiorari. *See Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (the Supreme Court is not "a court for correction of errors in fact finding").

Sports ("TWS"), a division of TW, itself granted Joe Hand Promotions limited exclusive rights to distribute closed circuit ("CCTV") telecasts of HBO live boxing events to commercial establishments. Joe Hand sublicensed to NSS the right to sell CCTV telecasts of several fights to commercial establishments in various states, including Ohio, and a boxing match between Evander Holyfield and Bobby Czyz. TW retained the exclusive right to distribute the communication of that match to its residential customers through its HBO service. However, TW provided HBO service of the fight to Coach's Corner, a commercial establishment in Ohio. NSS sued TW under 47 U.S.C. § 605.

The *Coach's Corner* litigation turned on NSS' standing under the particular terms of the governing contract between TWS and Joe Hand. The contract dealt differently with the CCTV telecasts and TW's own HBO telecasts. With respect to the former, it barred Joe Hand from "commenc[ing] or settl[ing] any claim or litigation arising out of [any] alleged piracy, use or proposed use of the CCTV telecast of the Events" without notifying TWS and giving it and HBO the opportunity to be involved in resolving the claim. (JA 263). With respect to the latter, the contract absolutely barred piracy litigation: "Neither you nor your sublicensees shall have any right to act on behalf of either TWS or HBO or to commence or settle any claim or litigation regarding the HBO feed, signal or telecast." (JA 263). TW argued in its summary judgment motion: "NSS's proprietary interest is defined by the agreements which grant the interest. The interest granted to NSS includes certain rights and excludes other rights. One of the rights excluded is NSS's ability to sue for cable television piracy." (JA 254). TW's reply brief also centered its standing argument on the particular terms of the governing contract, citing contractual language that NSS did not "have any right . . . to commence or settle any claim or litigation regarding the HBO feed, signal or telecast." (JA

296). TW reiterated this contractual argument in its point entitled "Plaintiff is Not a 'Person Aggrieved' Under § 605": "the undisputed fact that Coach's Corner received the signal carrying the Event from TWE [TW] *considered in light of the plain terms of the TVLA* [the TWS-Joe Hand agreement], mandates this Court's finding that plaintiff has NO rights to suit for the alleged interception." (JA 296-297) (emphasis added, capitals in original).

At oral argument TW again emphasized that NSS "was granted whatever rights it has pursuant to contract. And as a result of those contracts, *whatever standing it has to sue for those proprietary rights it derived from the contracts themselves*. . . . It's clear by each of the contracts that are relevant to this transfer of rights that National Satellite Sports has no rights and it never did." (JA 95) (emphasis added). Counsel concluded his argument by again noting "the very explicit language that licensees and sublicensees had no right to pursue any type of action to the HBO feed and that National Satellite Sports had no right to pursue any action founded in piracy for any of the feeds." (JA 97). In short, TW never even argued that NSS would not be an "aggrieved person" under 47 U.S.C. § 605(d)(6) even in the absence of the limitations in the governing contract.

The *Coach's Corner* magistrate judge orally granted TW's motion for summary judgment from the bench. He explained: "I view this decision as expressly limited to the facts and circumstances presented in this case." (PA 64a). "[NSS'] effort to overcome the language of the contract does not create a material fact for trial." (PA 65a). The magistrate judge then spent the equivalent of three transcribed pages analyzing the terms of the contract. Turning to § 605, he followed the definition of a "person aggrieved" with just two sentences. In the first, he found, obviously based on the contract, "In this case, I don't think there is any dispute that the communication at issue was the HBO network feed and not the closed circuit television

feed which was what . . . National Satellite had an interest in." (PA 66a). The second sentence was his conclusion: "[a]nd based upon that, those undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person." (PA 66a).

The district court in this action granted NSS' motion for summary judgment, and found no merit in TW's arguments that *Coach's Corner* precluded NSS from litigating this case; that NSS was not an "aggrieved" person within the meaning of § 605 and therefore lacked standing; and that NSS could not demonstrate that TW violated the Act. Specifically, the court found that "[d]efendant's assertion that plaintiff's claim is collaterally estopped by a prior determination in another case is not well-taken." (PA 36a). The court reasoned: "[t]he court in that case first concluded, at the summary judgment stage, that National Satellite had failed to state a claim because it had entered into a contract, the terms of which specifically provided that National Satellite had no right to pursue a piracy action." (PA 37a). The "second basis for the holding was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action." (PA 37a). In contrast to *Coach's Corner*, the contract governing NSS' rights in this lawsuit expressly authorized NSS "to monitor and/or police for unauthorized use and exhibition of the telecast within its territory and to seek legal redress for any damages that it may suffer as a result of said unauthorized use" and did not restrict NSS' rights to its own CCTV telecasts. (JA 135). The court also found that TW failed to show that there was a "full and fair opportunity" in *Coach's Corner* to litigate the issue of whether NSS would have lacked standing under § 605 even absent the language of the TWS-Joe Hand contract, as would be required for collateral estoppel. (PA 38a). The court observed that "[d]efendant points to nothing in the record to support [its] conclusion" that there was a full and fair opportunity. "This hardly satisfies defendant's burden of demonstrating

to the Court that there was such a 'full and fair opportunity to litigate' the issue." (PA 38a). The district court also squarely rejected TW's arguments for an overly narrow construction of § 605. (PA 39a). Finally, the court found TW was liable to NSS under § 605(a) because "[t]here can . . . be a violation of § 605(a) in the context of a cable television communication even if the violator receives a communication signal that it is legally entitled to receive, if it then diverts or sends the communication to an entity that is not entitled to the communication." (PA 39a-40a). The district court awarded NSS statutory damages, together with costs and attorneys' fees, for this violation of § 605.

The Sixth Circuit affirmed on all three grounds. With respect to collateral estoppel, the Court of Appeals extensively reviewed both the factual issues and the language of the oral ruling in *Coach's Corner*. TW argued that the magistrate judge's decision in *Coach's Corner* was based on two alternative, but independent grounds, and that the Sixth Circuit should follow an out-dated "rule" that in such circumstances collateral estoppel attaches to both grounds of the trial court's decision. However, the Sixth Circuit reasoned that in light of the particular circumstances of that oral ruling, it was not "necessary to fully resolve this issue [of whether the modern Restatement rule is the better rule] at the present time." (PA 13a). The court emphasized that the "oral ruling in *Coach's Corner* transcribes into only a two-paragraph conclusory statement regarding NSS's claim under § 605, which was far overshadowed by the balance of its three-page discussion outlining the contractual obstacles that prevented NSS from suing TW." (PA 13a). The court concluded that the "*Coach's Corner's* secondary holding that NSS failed to state a claim under § 605 was thus not necessary to the granting of TW's motion for summary judgment." (PA 13a). Accordingly, "NSS is not bound by the decision in *Coach's Corner*." (PA 15a).

On the § 605 issues, the Sixth Circuit extensively analyzed the language of the statute, the legislative history, and the applicable caselaw. The court concluded: "we find no merit in Time Warner's argument that NSS does not have standing to sue under § 605." (PA 21a). The district court's interpretation [of standing under § 605] is consistent with the legislative history of § 605(d)." (PA 17a). Moreover, "[l]imiting the availability of civil actions ... is inconsistent with the intent of Congress as expressed in the [1984 and 1988 amendments] . . . Both [amendments] were intended to expand the scope of protection provided by the Communications Act, not limit it." (PA 18a). The court also held that § 605 "protects both the transmission and its contents," and that TW and NSS "had proprietary interests in the *transmission* of the *content* of the boxing match." (PA 23a). TW violated § 605(a) by divulging the communication through an electronic channel to an entity other than the addressee intended by the sender. (PA 26a-27a).

REASONS FOR DENYING THE WRIT

I. *Coach's Corner* does not estop NSS from pursuing this litigation.

This case hinges on unique factual circumstances which make it an inappropriate vehicle to address the question TW seeks to raise of whether a trial court decision based on two alternative holdings should be given preclusive effect as to both. TW contends that an alternative ground for the magistrate judge's oral grant of summary judgment in *Coach's Corner* was that NSS was not a "person aggrieved" within the meaning of 47 U.S.C. § 605(a) even if one were to ignore the terms of the governing contract which denied NSS the right to pursue the piracy claim at issue. TW cannot meet its burden to show that there was, and it is inconceivable that the magistrate judge intended to make, such an independent, alternative ruling, particularly when

that issue was never even raised before that court. Moreover, TW cannot satisfy two of the other prerequisites for collateral estoppel -- an identity of issues and a full and fair opportunity to be heard. Even if one were to disregard these dispositive deficiencies in TW's argument, this case would be inappropriate for certiorari because there is no reason to depart from the Sixth Circuit's well-reasoned decision that collateral estoppel does not bar this litigation. There is little conflict on the issue of the preclusive effect of a prior trial court decision where that decision rests on two independent, alternative grounds. Rather, the clear trend is to follow the modern Restatement rule which is consistent with the decision in this case. The only Circuit cases citing the old, contrary rule do so in dicta, or are outdated or unpublished decisions. Accordingly, this Court should deny TW's petition.

1. "The party asserting preclusion bears the burden of showing with clarity and certainty what was determined by the prior judgment." *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000) (internal quotations omitted); *see also* 1B James W. Moore, *Moore's Federal Practice* .443[5-.1] (the issue for which estoppel is sought must clearly have been necessary to the prior judgment). TW cannot meet that burden here.

It is inconceivable that the magistrate judge held or intended to hold that NSS lacked standing under the statute irrespective of the language of the governing contract, much less that any such holding was necessary to the outcome of *Coach's Corner*. Indeed, since NSS' rights derived from that contract, such a holding would have been nonsensical. The magistrate judge found that "[NSS'] effort to overcome the language of the contract does not create a material issue of fact for trial" because NSS was governed by a contract which expressly provided that NSS had no right to pursue a piracy action with respect to the HBO feed. (PA 65a). Although the magistrate judge did say that

there was a second ground for his decision -- namely the language of § 605 -- his statutory ruling was also based on the specific terms of that contract. Thus, his statement that "there is [not] any dispute that the communication at issue was the HBO network feed and not the closed circuit television feed which was what Joe Hand and then subsequently National Satellite had an interest in" is drawn directly from the contract. The magistrate judge's next sentence that, "based upon that, these undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person," is therefore also clearly based on the language of the contract. The magistrate judge never intimated that absent the limiting language in that contract, NSS would still have lacked standing to sue under § 605. TW never even presented that position to the magistrate judge, either in its briefs or at oral argument.

Moreover, the district court below correctly held that TW "has not demonstrated, as it must, that the determination of this particular issue was essential to the [prior] judgment." The "second basis for the holding [standing under the statute] was not essential to the judgment, since, in the court's view, the contractual language clearly barred the action." (PA 37a). Since the only basis for the magistrate judge's decision that is clear is that NSS lacked standing under the particular terms of the applicable contract, TW has failed to meet its burden of showing that the *Coach's Corner* judge made an independent, alternative holding with respect to standing under the statute that would be applicable in the circumstances of this case.

2. TW has also failed to meet its burden of establishing an identity of issues, which is another basic prerequisite of collateral estoppel. *Coach's Corner* did not raise the same issues as are present here, because it involved a different contract which expressly precluded NSS from suing for any communication of the HBO telecast, which was the

communication at issue, while here the contract expressly authorizes NSS to sue concerning any piracy or unauthorized use or exhibition of the telecast within its territory. Thus, there is no basis for TW's glib statement that the only difference between *Coach's Corner* and this case is supposedly that they involve a different boxing match and a different bar. (P 6-7). TW only briefly refers to the critical difference in the two contracts, in a cursory footnote. (P 7 n.2). However, "[i]f particular issues in the two suits differ in any significant way, a prior determination of one is simply irrelevant to a later determination of the other." *Overseas Motors, Inc. v. Import Motors Ltd.*, 375 F. Supp. 499, 519 (E.D. Mich. 1974), *aff'd*, 519 F.2d 119 (6th Cir. 1975). *Coach's Corner* decided only that under the contract applicable in that case, NSS did not have the right to assert a claim with respect to the improper transmission of the HBO telecast at issue in that litigation. Accordingly, TW has failed to establish that *Coach's Corner* involved an identity of issues.[2]

3. TW has not met its burden of establishing that NSS had a "full and fair opportunity" to litigate in *Coach's Corner* whether it would have had standing to sue under 47 U.S.C. § 605(a) in the absence of the contractual prohibition applicable in that case. "[T]he requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard," and thus must pass muster "procedurally, substantively, and evidentially." *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313,

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[2] The Sixth Circuit below did not address the significant difference in the contracts in its erroneous finding on the identity of issues prong of the collateral estoppel test.

329, 333 (1971). "[T]he application of collateral estoppel has been narrowly tailored to ensure that it applies only where the circumstances indicate the issue estopped from further consideration was thoroughly explored in the prior proceeding." *Johnson v. Watkins*, 101 F.3d 792, 795 (2d Cir. 1996).

Here, the issue of standing under § 605 irrespective of the TWS-Joe Hand contract was never even presented by TW in *Coach's Corner*, much less "thoroughly explored" in that proceeding. TW never argued that NSS would not have had an interest in the communication of the HBO feed to a commercial establishment irrespective of the contract. To the contrary, TW's briefs in *Coach's Corner* focused on the particular terms of the contract: "NSS's proprietary interest is defined by the agreements which grant the interest. The interest granted to NSS includes certain rights and excludes other rights. One of the rights excluded is NSS's ability to sue for cable television piracy." (JA 254). NSS responded to those arguments that "the first step in the process of determining whether a party has rights to commence an action is to refer to the language employed in the agreements between the parties." (JA 157). NSS similarly framed its arguments on standing under § 605 in terms of its contractual rights, contending that the issue was "whether a contractual clause imposing a condition must be satisfied in order to deny standing." (JA 156). At oral argument, TW similarly focused on the TWS-Joe Hand contract, asserting that NSS had "whatever rights it has pursuant to contract. And as a result of those contracts, whatever standing it has to sue for those proprietary rights it derived from the contracts themselves." (JA 95). As the district court correctly held, TW "points to nothing in the

record to support this conclusion [that NSS had a full and fair opportunity]." (PA 38a).[3]

Accordingly, TW cannot establish three of the four prerequisites for collateral estoppel, any one of which would be a sufficient independent basis to support the finding that collateral estoppel did not preclude NSS from pursuing this litigation.

4. Only if TW could establish an identity of issues, a full and fair opportunity to litigate them in the prior proceeding, and an alternative and independent holding that was necessary for the prior decision could TW reach the question it now seeks to present to this Court. Even then, however, certiorari should be denied because the Sixth Circuit's denial of estoppel was correct and consistent with the clear trend among the Circuits to follow the modern rule, as set forth in the Restatement (Second) Judgments § 27 (comment i). The Restatement provides that, with respect to trial court judgments: "[i]f a judgment . . . is based on determination of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) Judgments § 27 (cmt. i). At least seven other Circuits follow this modern rule.[4] The Seventh Circuit characterized this

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[3] The Sixth Circuit erroneously disagreed with the district court's determination that the full and fair opportunity prong was not met.

[4] *See, e.g., Arab African Int'l Bank v. Epstein,* 958 F.2d 532, 535 (3d Cir. 1992), *rev'd on other grounds,* 10 F.3d 168 (3d Cir. 1993); *Ritter v. Mount St. Mary's College,* 814 F.2d 986, 993 (4th Cir. 1987); *Hicks v. Quaker Oats Co.,* 662 F.2d 1158, 1166-67 (5th Cir. 1981); *Peabody Coal Co. v. Spese,* 117 F.3d 1001, 1008 (7th Cir. 1997) (*en banc*); *Baker Elec. Co-op v. Chaske,* 28 F.3d 1466, 1475-76 (8th Cir. 1994); *Turney v. O'Toole,* 898 F.2d 1470, 1472 n.1 (10th Cir. 1990);

modern Restatement rule as the "general rule on issue preclusion." *Schwager v. Fallas (In re Schwager)*, 121 F.3d at 177, 183 (5th Cir. 1997).

The contrary rule advocated by TW would waste judicial resources by promoting frivolous and unnecessary appeals in cases where a party recognizes that one independent ground for a trial court decision is correct, even though a second ground may be erroneous. *See, e.g.*, Restatement (Second) Judgments § 27 (comment i) (a contrary rule "might be responsible for increasing the burdens of litigation of the parties and the courts rather than lightening those burdens").[5] This case illustrates the absurd potential consequences of TW's proposal. TW's rule would have forced NSS to pursue an entirely useless appeal in *Coach's Corner* on an issue (whether it would have had standing absent the contractual limitation on its right to pursue piracy claims) that was not even clearly an alternative ground for the magistrate judge's decision, solely to protect itself against possible future collateral estoppel consequences, even though, in the words of the Sixth Circuit, "while [NSS] might have won the 'battle' over § 605, NSS would almost surely have lost the 'war' in being unable to overcome the contractual prohibition on commencing litigation against Time Warner." (PA 12a-13a). TW concedes this outcome: "It is true that, if one of

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Comair Rotron, Inc. v. Nippon Densan Corp., 49 F.3d 1535, 1538 (Fed. Cir. 1995).

[5] TW's only support for its wholly speculative argument that "the expense in terms of judicial economy is markedly lower" under its proposed rule than under the modern Restatement rule, is an article which fails to cite any empirical evidence or any other authority to support its conclusory assertion. (P 16).

the alternative grounds is unassailable, an appellant is unlikely to obtain a reversal." (P 16).

The New York Court of Appeals aptly explained why it would be ludicrous to require an appeal under these circumstances: "it would be . . . fundamentally unfair to give preclusive effect to a determination where the only incentive to litigate stems from its potential collateral effects. Such a ruling would ill serve the litigation-limiting purposes of collateral estoppel; it would simply encourage overlitigation at an earlier stage." *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 527 N.E.2d 754, 757 (N.Y. 1988). Indeed, such an appeal would likely draw sanctions under Fed. R. App. P. 38. That is exactly what happened in *Nagle v. Alspach*, 8 F.3d 141 (3d Cir. 1993), where the Third Circuit imposed sanctions under Rule 38 on appellants who challenged only two of the four conclusions relied on by the district court to support its grant of summary judgment. Because the lower court judgment would be affirmed even if the Court of Appeals held for the appellant on both of the appealed grounds, the Third Circuit found that "[t]his appeal therefore never had any possibility of resulting in a reversal and is frivolous." *Id.* at 145. Moreover, because even a finding for the appellant on such an alternative ground would have no effect on the ultimate outcome of the case, the filing of such an appeal would be tantamount to seeking an impermissible advisory opinion. *See Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948). This shows that it is nonsense for TW to argue that "preclusion cannot be withheld on the theory that it is unfair to bind the losing litigant to a holding that, in the presence of an unassailable alternative holding, cannot successfully be appealed. Alternative grounds *can* be appealed, and a losing litigant has every incentive to do so." (P 2).

The concern that alternative holdings do not necessarily reflect the same thoughtful consideration further militates

in favor of the modern Restatement rule. Once again, this case provides a persuasive illustration of this fact. The magistrate judge in *Coach's Corner* devoted a mere three sentences of his oral opinion to the statutory standing issue, and he received no briefing or oral argument on the issue. If he intended to give an advisory opinion as to whether NSS would have had standing absent the applicable contractual restrictions, he certainly did not say so clearly.

Rather than directly address these important issues, TW attempts to draw an analogy between collateral estoppel and *stare decisis*. However, the Supreme Court and Circuit caselaw relied upon by TW rest on a crucial distinction between an alternative decision of the Supreme Court or an appellate court, and that of a trial court, a distinction TW glosses over.[6] Those cases merely support the Restatement's companion to the rule at issue here. The Restatement provides that alternative holdings of an appellate court are entitled to preclusive effect, while those of a trial court are not. *Compare* Restatement (Second) Judgments § 27 comment o *with* comment i. This

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[6] For instance, the one circuit case cited by TW to support its contention that *stare decisis* applies to alternative holdings specifically limits the application of that rule to holdings by an appellate court. *Natural Res. Def. Council v. NRC*, 216 F.3d 1180, 1189 (D.C. Cir. 2000). Similarly, the case upon which TW relies to suggest a general proposition that *stare decisis* applies as much to secondary holdings as to primary holdings arises in the context of the Supreme Court, not a trial court. *See Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 342 (1928). Courts have emphasized the importance of the holdings of this Court: "even if the [Supreme] Court's reliance on two independent grounds rendered each dictum, we would still be bound by its interpretation ... since carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Natural Res. Def. Council*, 216 F.3d at 1189 (internal quotations omitted).

distinction is supported by a sound policy rationale. The primary reason for the rule with respect to *trial* court determinations is the concern about encouraging frivolous appeals. In contrast, because certiorari is granted by this Court only rarely and in particularly compelling cases, a circuit court is generally effectively the court of final decision, thereby minimizing policy concerns about encouraging unnecessary appeals from decisions of that court.

5. Another independent reason for denying the writ is that although TW attempts to point to a conflict in the Circuits, the overwhelming trend in the circuit courts is to follow the modern Restatement rule. The Third, Fourth, Fifth, Seventh, Eighth, Tenth and Federal Circuits follow this rule, whereas TW argues that only three Circuits (the D.C., Second and Ninth) follow the out-dated rule. (P 12). However, the decisions cited by TW do not evidence any meaningful conflict, are easily distinguishable from this case and in some cases may not remain good law.

For example, the Ninth Circuit decisions relied on by TW fail to support its argument that there is a meaningful conflict. *In re Westgate-Cal. Corp.*, 642 F.2d 1174 (9th Cir. 1981), was decided prior to the publication of the Second Restatement of Judgments in 1982, which takes a position on this issue that is contrary to that of the First Restatement. Moreover, the Ninth Circuit's cursory decision does not explain the reasoning for its choice of a collateral estoppel rule, but merely asserts that it is following the "established rule," based on a citation to an earlier version of *Moore's Federal Practice*. 642 F.2d at 1176-77. However, as the Sixth Circuit noted below, the current version of *Moore's Federal Practice* "describes the [Second] Restatement's view as the 'new' and 'modern' rule." (PA 12a). The only other support TW cites for its contention that the Ninth Circuit continues to follow the old rule is *Bank of Guam v. Wiseman*, No. 87-1799, 1990

WL 140521, at *2 (9th Cir. Sept. 27, 1990) (unpublished), an *unpublished* decision which, pursuant to Local Circuit Rule 36-3(a), is "not binding precedent." *See also Territory of Guam v. Borja*, 983 F.2d 914, 917 (9th Cir. 1992), *amended* (Jan. 20, 1993); *Leal-Rodriguez v. INS*, 990 F.2d 939, 946 (7th Cir. 1993).[7]

The District of Columbia Circuit's decision in *Yamaha Corp. of America v. United States*, 961 F.2d 245 (D.C. Cir. 1992), does not establish any meaningful conflict. *Yamaha* involved a completely different collateral estoppel issue. There, in the prior litigation, the Ninth Circuit affirmed the district court's decision based on only one of the two alternative grounds for the lower court decision. The District of Columbia Circuit thus addressed the applicability of collateral estoppel only where two alternate grounds are appealed and the appellate court ruled only on one of them. This situation is addressed in a completely different section of the Restatement (Second) Judgments. *Compare* § 27 comment o, which is entitled "Effect of an appeal," *with* comment i entitled "Alternative determinations by court of first instance." Accordingly, *Yamaha*'s statement concerning the collateral estoppel rule at issue here was merely *dicta*, and had no bearing on any of the issues actually before that court.

Nor does the Second Circuit case law cited by TW show that that Circuit follows a conflicting rule. TW relies on three Second Circuit cases. *Irving Nat'l Bank v. Law*, 10 F.2d 721 (2d Cir. 1926), was decided nearly eighty years ago, and since then, the Second Circuit has followed the

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[7] The Ninth Circuit's rule also prohibits citation of an unpublished decision to any of the courts of that Circuit.

contrary modern rule. *See, e.g., Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970). *Williams v. Ward*, 556 F.2d 1143 (2d Cir. 1977), recognized that the conclusion in *Halpern*, which was subsequently codified in the modern Restatement rule, that "'an issue not essential to the prior judgment may not have been afforded the careful deliberation and analysis normally applied to essential issues' is a real one in some circumstances," but held that under the particular facts of *Williams* such a concern did not exist. *Id.* at 1154. The third Second Circuit case relied on by TW also does not show a meaningful conflict. Like *Yamaha*, *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38 (2d Cir. 1986), addressed a completely different issue of the application of collateral estoppel where there was an appeal in the prior litigation. The Second Circuit defined the collateral estoppel issue as follows: "We must therefore determine the collateral estoppel effect of an adverse District Court finding that was explicitly not reviewed but was necessary to a conviction that was said to have been affirmed." *Gelb*, 798 F.2d at 44. Accordingly, any statement about the collateral estoppel effect of an unappealed decision resting on two alternative grounds was *dicta*.

In short, contrary to TW's contention that there is a complete split of authority, there is an overwhelming trend towards the modern Restatement rule, with only dicta and out-dated or unpublished Circuit decisions supporting the prior rule.[8]

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[8] TW cites commentators who it claims are "likewise in disagreement" with the modern rule. (P 13 & n.5). For example, TW compares Restatement (Second) Judgments § 27 cmt. i (1982) with the *First* Restatement, which took a contrary view. But this merely shows that the authors of the Restatement have changed their position to

6. TW attempts to bolster its "conflict" argument by claiming that the Sixth Circuit actually created a new approach. That argument is belied by the decision itself. The Sixth Circuit did not say that it was creating a new rule of collateral estoppel. To the contrary, the court stated that "[w]e find NSS's point persuasive," based on the reasoning of the Restatement and the many other Circuits following that rule. (PA 12a).[9]

II. The Sixth Circuit correctly applied the plain language of § 605, and its holding is entirely consistent with both the legislative history and the caselaw on § 605.

The Court of Appeals below correctly found that NSS had standing in this action to sue as a "person aggrieved" under § 605, that TW is liable for violating that section, and that the type of improper divulging of the content of a communication in which TW engaged is precisely what Congress intended to remedy when it enacted the Communications Act. The clear language of the Communications Act, together with its legislative history and the caselaw interpreting § 605 mandate the holdings

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the one adopted by most courts. TW similarly cites a 1942 article written by one of the reporters of the First Restatement, but that article has no bearing on NSS' position that sixty years later, courts have adopted the Second Restatement rule.

[9] In any event, TW's contention that a primary/secondary distinction rule is unworkable because it is not clear ignores the reality of many decisions. It is well-settled that only holdings, and not *dicta*, are binding precedent. Thus, courts and parties regularly examine court decisions to determine the actual holding versus mere *dicta*, despite the fact that in many cases, it is not entirely clear what is a holding versus *dicta*. TW does not cite any evidence that distinguishing a primary ground from a secondary ground would be any more difficult.

below and there are no cases nor any legislative history that are inconsistent with these holdings. They do not raise any issues meriting this Court's review.

1. NSS is a "person aggrieved" and had standing to sue TW under §§ 605(e)(3)(A) and 605(d)(6) whether or not NSS had a proprietary interest in the communication that TW divulged to Melody Lane Lounge. In any event, NSS did have a proprietary interest and the communication was intercepted within the meaning of the statute.

Congress designed the Communications Act to provide "both prosecutors and civil plaintiffs [with] the legal tools they need to bring piracy under control." P.L. 100-67, *Trademark Law Revision Act of 1988 - Satellite Home Viewer Act of 1988*, H.R. Rep. No. 887(11), *1988 U.S. Code Cong. & Admin. News* 5577, 5658. Congress amended the statute in 1984 and 1988 to further deter theft of cable service. The 1984 amendments added to § 605 subsections (b)-(e) to address "a problem which is increasingly plaguing the cable industry - the theft of cable service." *Cable Communications Policy Act of 1984*, H.R. Rep. No. 98-934, *1984 U.S. Code Cong. & Admin. News* 4655, 4720. This piracy threatened legitimate satellite dealers and programmers who would otherwise receive payments for their programming. *1984 U.S. Code Cong. & Admin. News* at 4702. As amended, § 605(e)(3)(A) of the Act provides that "[a]ny person aggrieved by any violation of subsection (a) . . . or paragraph (4) may bring a civil action in a United States district court." Section 605(d)(6) defines the term "any person aggrieved" as follows:

> the term 'any person aggrieved' *shall include* any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming, and, in the case of a violation of paragraph (4) of subsection

> (e) of this section shall also include any person engaged in the lawful manufacture, distribution, or sale of equipment necessary to authorize or receive satellite cable programming. (emphasis added).

TW argued below that the 1984 and 1988 amendments adding § 605(d)(6) to the Act supposedly somehow *narrowed* the class of persons with standing to sue under § 605(e)(3)(A), an argument the Sixth Circuit squarely rejected because it "flies in the face of Congress's explicit interest in 'expanding standing to sue' under the Act." (PA 18a) TW appears to back away from this argument in its petition and now concedes that the purpose of the 1988 amendment was to expand standing by making clear that it included wholesale or retail distributors of satellite cable programming. (P 21 n.14).

Nevertheless, TW continues to argue that the statutory language "any person aggrieved" does not mean what it says.[10] TW cites cases applying other statutes with similar language (P 21-23), but none of them requires a different decision here. The language of § 605, together with the caselaw and legislative history of *this* Act make clear that the Sixth Circuit and the district court below properly rejected TW's argument that NSS lacked standing and that TW was not liable.

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[10] TW's convoluted argument that "standing is appropriate only for parties with a reasonable expectation to that effect" (P 23), is circular. Both courts below found that NSS has standing under the clear language of the statute and that the statute was designed to protect NSS from this type of piracy. Accordingly, NSS certainly would have a reasonable expectation of having standing under the Act.

As the Sixth Circuit found, the legislative history of the 1988 amendment states that one of its purposes is "expanding standing to sue." (PA 18a). The Sixth Circuit had "previously recognized Congress's intent to expand rather than contract the reach of the Communications Act when it amended § 605." (PA 19a). Other courts, too, have found that this legislative history mandates a broad interpretation of standing. *See, e.g., MediaOne, Inc. v. E&A Beepers & Cellulars*, 43 F. Supp. 2d 1348, 1353 (S.D. Fla. 1998). There is absolutely no evidence that Congress intended to narrow standing by adding § 605(d)(6).

TW's interpretation of "any person aggrieved" is also refuted by the statutory language itself, for at least four reasons. First, as the Sixth Circuit held, the term "include" in the statute is not exclusive as a matter of plain language. (PA 17a)("[t]he district court held that the use of the word 'include' in the statutory phrase 'any person aggrieved shall *include* any person . . .' does not mean that *only* persons who meet that definition have standing to sue. We agree."); *accord General Instrument Corp. v. Nu-Tek Elecs. Mfg., Inc.*, No. 93-CV-3854, 1996 WL 442790, at *5 (E.D. Pa. July 31, 1996), *aff'd*, 197 F.3d 83 (3d Cir. 1999).

Second, by TW's logic *only* wholesale or retail distributors of satellite cable programming could sue. That would be an absurd result since § 605(6) covers all wire or radio communications. *See, e.g., Joe Hand Promotions v. Rennard St. Enters.*, 975 F. Supp. 746, 752 (E.D. Pa. 1997). Moreover, if TW's interpretation were correct, then the only persons with standing to sue for violation of § 605(e)(4) would be persons "engaged in the lawful manufacture, distribution or sale of equipment necessary to authorize or receive satellite cable programming." But TW itself, although not falling within that category, has sued under § 605(e)(4), arguing that it was a "person aggrieved," and obtained relief. *See Time Warner Cable v. Freedom Elecs.*, 897 F. Supp. 1454, 1459 (S.D. Fla. 1995). Accordingly,

TW should be judicially estopped from taking a different position now.

Third, TW concedes that § 605(d)(6) affords standing "to entities seeking to combat unauthorized interceptors' acts of communications piracy." (P 25). Here, TW was not authorized to divulge the contents of the communication to Melody Lane Lounge under the clear language of 47 U.S.C. § 605(a). TW was not free (or, in the language of the statute, it did not have an authorized channel of transmission) to divulge the contents to everyone in its cable system.[11]

Fourth, even if this Court were to adopt TW's construction of § 605(d)(6), NSS would still have standing because it had a proprietary interest in the communication, as the Sixth Circuit found. (PA 23a). NSS is not a "stranger" that had only "some indirect economic interest in the communication's content." (P 24). Rather, NSS had a proprietary interest in the communication of the content of the boxing event to commercial establishments in Ohio. That right is of significant economic value to NSS, as the district court below found: "[p]iracy of programming poses

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[11] It is ironic that TW which has extensively used this statute and the cable piracy statute to prosecute others objects that NSS has been forced to utilize the statute to protect its interests. *See, e.g., Time Warner v. M.D. Electronics, Inc.*, 101 F.3d 278 (2d Cir. 1996); *Time Warner v. Googies Luncheonette, Inc.*, 77 F. Supp.2d 485 (S.D.N.Y. 1999); *Time Warner Cable v. Taco Rapido Restaurant*, 988 F. Supp. 107 (E.D.N.Y. 1999); *Time Warner Entertainment v. Worldwide Electronics, L.C.*, 50 F. Supp.2d 1288 (S.D. Fla. 1999). Indeed, the proliferation of lawsuits filed bears witness to the extensive problems which NSS faces as a result of piracy and why courts must use the full power of this statute to deter and prevent any and all forms of intercepted or misdirected communications.

a serious threat to the business interests of National [Satellite Sports], whose income depends primarily on its status as an exclusive licensee. Piracy also poses a threat to the goodwill of National's customers, who are less willing to pay for services if their competition is able to get them free through piracy." (PA 51a). *See also Joe Hand Promotions v. Rennard Street Enterprise,* 975 F. Supp. at 752. Moreover, the communication was "intercepted" within the meaning of the statute.

Other courts have found that plaintiffs with similar claims have standing. *See, e.g., Joe Hand Promotions v. Rennard Street Enterprise,* 975 F. Supp. at 753 ("plaintiff is an aggrieved person for purposes of Section 605, because it has a proprietary right to the distribution of the HBO broadcast. Therefore, if it can prove that the defendant received the boxing matches directly from the satellite, rather than the coaxial cable network, the plaintiff has standing to sue under Section 605."); *Television Signal Corp. v. Chapman,* No. C92-3732, 1993 WL 69179, at *2 (N.D. Cal. Mar. 3, 1993) ("Viacom clearly has standing to bring suit as a 'person aggrieved.' . . . by its . . . . licensing agreements, Viacom acquired the exclusive rights to telecast Fight No. 1 and Fight No. 2 in the Northern California area [through HBO and pay-per-view]. . . . Viacom would certainly have standing to bring suit for any unauthorized interception of the fight in this area").[12]

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[12] To the extent that TW suggests that its "inadvertent" conduct should not render it liable, such an argument is inapplicable because, as noted, TW was at fault. Moreover, Section 605 is a strict liability statute. TW itself has benefited from this. *See, e.g., Time Warner Cable v. Taco Rapido Rest.,* 988 F. Supp. 107, 111 (E.D.N.Y. 1997). In any event, TW cannot plausibly contend that it was innocent given that the installer had been in the bar and seen that it clearly

2. The courts below also correctly found that TW violated § 605(a) when it transmitted the communication of the event to an entity to which TW was not authorized to transmit it. The Act does not exempt from liability entities, such as TW, that are authorized to transmit the communication to some recipients, if they do so to others.

TW's argument to the contrary rests on a single unsupported assertion: that Congress could not have intended NSS to "be within the zone of interests protected by the first sentence of Section 605(a), simply because [it has] some indirect economic interest in the communication's content." (P 24). That speculation is baseless. Moreover, NSS' economic interest in the communication's content is not indirect. TW apparently disagrees (P 23-24) with the fact finding of the courts below that the signals NSS and TW received in their respective Ohio facilities both originated from the same initial transmission of the communication. That disagreement is not a basis for certiorari.

TW's petition also ignores that, in similar circumstances, other courts have reached consistent interpretations of § 605, even though this caselaw was cited by the Sixth Circuit below. (PA 25a-26a). For example, *Joe Hand Promotions v. D.M.B. Ventures, Inc.*, No. CIV. A. 93-2656, 1995 WL 328399 (E.D. La., May 31, 1995), involved similar facts. There, Cox Cable acquired the right to distribute a boxing match in New Orleans to residential

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did not appear to be residential. TW was wrong to allow this account to be established and to continue as residential; any wrongful act which resulted cannot be subsumed or excused under a guise of innocence. Similarly, no cable company should be allowed to escape liability for similar acts.

customers by pay-per-view. Joe Hand Promotions had the exclusive right to distribute the match to commercial establishments in New Orleans. Joe Hand discovered that four commercial establishments showed the match without authorization, and sued both the cable company and the commercial establishments under § 605. The court ruled in favor of Joe Hand, and found no basis for the arguments Time Warner attempts to make here. For example, the court disagreed with Cox Cable's contention that cable companies are entitled to an implicit exemption from liability -- which is essentially Time Warner's argument here: 1) the fifth sentences of § 605 (a) and (b) exempt specified persons and communications from the reach of the statute, and cable companies are not among the listed exemptions; 2) § 605(a) applies to persons legitimately receiving, assisting in receiving, transmitting, and assisting in transmitting interstate communications by wire and radio, and courts have "uniformly held" that this includes satellite signals; 3) the legislative history does not even suggest that Congress intended to exempt cable companies; and 4) there is a "strong policy against implied exemptions." *Id.* at **3-4. The court also rejected the cable company's argument -- also advanced by Time Warner here -- that it should escape liability because it did not willfully provide unauthorized programming to a commercial establishment, because "liability under Section 605(a) does not require a showing of intent or specific knowledge. The statute provides that 'no person' shall receive, intercept, or assist in the unauthorized interception of radio and wire communications." *Id.* at *4.

The court in *That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995 (D. Md. 1993), similarly found § 605 standing and liability based on another analogous fact pattern. The plaintiff there had purchased the exclusive licensing rights to the live closed circuit television broadcast of a boxing match in commercial establishments; other entities had the exclusive right to broadcast the event

to private, residential cable subscribers on a pay-per-view basis. A commercial establishment showed the broadcast through the residential pay-per-view service. The court granted summary judgment to That's Entertainment, finding a violation of § 605(a). The Court held that "[e]ven assuming, as these defendants contend, that there was no 'interception' here because [the bar] was 'authorized' by [the residential distributor] to receive the Event on a pay-per-view basis, defendants still have violated the Act because they clearly were not authorized to broadcast the Event to the patrons of a commercial establishment . . . [§ 605(a)] clearly proscribe[s] the unauthorized divulgence or use of communications which have been 'received' legally for certain purposes." *Id.* at 999.

Accordingly, the clear statutory language, legislative history, and caselaw interpreting and applying § 605, all support the decisions of the Sixth Circuit and the district court below.

3. TW erroneously labels the Sixth Circuit's decision "unprecedented" (P 18), in an attempt to obscure the fact that this issue is simply not appropriate or ripe for this Court's review.[13] As discussed above, TW simply ignores

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[13] TW's contention that this is properly a state law contract claim is similarly unavailing. NSS did not have a contract with TW. TW would have promptly moved to dismiss any lawsuit premised on a theory that NSS was somehow an intended third party beneficiary of TW's contract to license the event to its residential customers via pay-per-view and was thus liable for improperly transmitting it to a customer outside the scope of its contract. TW does not cite any caselaw in support of its contention that this should be a contract issue. Moreover, even if a state law claim existed, the Communications Act was designed to protect against the wrongful use of a communication and gives NSS a cause of action against TW here.

that other courts have, on similar fact patterns, reached consistent interpretations of § 605, and have found liability in these situations. The fact that the Sixth Circuit expressly followed this precedent is hardly cause for this Court's review. Indeed, TW does not and could not point to any conflict on these issues, rendering the issues, at best for TW, premature for this Court's review.[14] Because the decisions below were correct, there is no conflict among courts and the issues involved here are limited, this Court should deny the writ.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Court deny the Petition.

Dated: January 9, 2002

Respectfully submitted,

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[14] Although TW cites *Smith v. Cincinnati Post & Times-Star*, 475 F.2d 740 (6th Cir. 1973), in a footnote, the Sixth Circuit below distinguished its prior decision in *Smith* both because it was decided prior to the 1984 and 1988 statutory amendments and on its facts. (PA 24a).

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IN THE
Supreme Court of the United States

TIME WARNER ENTERTAINMENT COMPANY, L.P.
D/B/A TIME WARNER CABLE,
Petitioner,

v.

NATIONAL SATELLITE SPORTS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*:

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NSS argues that certiorari should be denied on both the collateral-estoppel issue and the Section 605 standing issue. The reasons to which NSS points, however, are unpersuasive.

I. REVIEW IS REQUIRED IN CONNECTION WITH THE COLLATERAL-ESTOPPEL ISSUE.

A. NSS argues that, even ignoring the "necessary to the judgment" prerequisite (as to which there is a split in the circuits), other prerequisites for collateral estoppel are not met here. In particular, NSS argues that the Section 605 standing issue was not raised in the prior *Coach's Corner* proceedings, *see* Br. in Opp. 10-11, that there accordingly was no identity between the issues there and those here, *see id.* at 11-12, and that the standing issue thus was not "actually litigated," *see id.* at 12-13. The easy answer is that, as NSS concedes (*see id.* at 12 n.2, 14 n.3), the court of appeals held otherwise. *See* Pet. App. 8a, 10a-11a, 14a-15a. That is the end of the matter. At most, NSS's arguments could point to alternative grounds for affirmance, which this Court does not ordinarily address.[1] Thus, even if such grounds existed, that would make this case no less certworthy.

Besides, NSS is wrong. Each of NSS's contentions turns on the premise that Time Warner made no argument before the *Coach's Corner* court that NSS would lack standing even if the contract there had not expressly precluded NSS from bringing suit. That premise is mistaken. *See id.* at 8a ("In its motion before the court in *Coach's Corner*, Time Warner argued that it was entitled to summary judgment because NSS was not a 'person aggrieved' within the meaning of § 605(d)(6), and could therefore not pursue a claim for an alleged violation of § 605(a)."). Indeed, NSS's own brief in *Coach's Corner* responded to the point by arguing that "[p]laintiff is clearly within the zone of interests to be

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[1] *See, e.g., TRW Inc. v. Andrews*, 122 S. Ct. 441, 450-51 (2001); *Glover v. United States*, 531 U.S. 198, 205 (2001); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996).

protected by 47 U.S.C. §605 as it is an aggrieved party." Plaintiff's Memorandum in Opposition at 15, *National Satellite Sports, Inc. v. Lynstalder, Inc.*, Case No. 5:97CV2039 (N.D. Ohio filed July 1, 1998); *see also* Time Warner's Reply Memorandum at 6, *National Satellite Sports, Inc. v. Lynstalder, Inc.*, Case No. 5:97CV2039 (N.D. Ohio filed July 9, 1998) ("[B]ecause Coach's Corner did not receive the signal carrying the Event via [NSS's transmission] . . . , plaintiff is not a 'person aggrieved' under § 605, and does not have standing to sustain this action against [Time Warner].").[2]

It is equally plain that the *Coach's Corner* court squarely decided the Section 605 standing issue. As the court explained:

> [T]he statute defines a person aggrieved as a person who is entitled to file suit for a violation under 47 U.S. Code Section 605(a), which includes any person with propriet[ar]y rights in the intercepted communication.

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[2] Moreover, contrary to its assertions in the Brief in Opposition, NSS extensively addressed the standing issue at oral argument in *Coach's Corner* (Tr. 22-23):

> In light of the definition contained in the statute for a person aggrieved, "any person aggrieved," which includes any person with proprietary rights in an intercepted communication, including wholesale or retail distributors of satellite cable programming, etcetera, etcetera, I would argue that it's clear that the plaintiff is an aggrieved person, party, and that it does in fact have standing to sue under the standards enunciated by the United States Supreme Court in [*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)].
>
> And in support of that, I would also cite the Court to [*Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc.*, 975 F. Supp. 746 (E.D. Pa. 1997)], which appears in our memorandum in opposition on pages 6 through 10.
>
> Interestingly, your Honor, that case involved the question of whether or not Joe Hand Promotions had standing to sue for an HBO boxing match. And that Court in fact found that Joe Hand Promotions did in fact have standing because it was an aggrieved party to sue for a violation of 605.

> In this case, I don't think there is any dispute that the communication at issue was the [network feed intended for cable operators] and not the closed circuit television feed which was what Joe Hand and then subsequently National Satellite had an interest in.
>
> And based upon that, those undisputed facts, plaintiff has failed to state a Section 605 claim as an aggrieved person.

Pet. App. 66a. By its terms, that holding had nothing to do with the contract clause precluding NSS from bringing suit; it was squarely based on NSS's status as a stranger to the signal that found its way to Coach's Corner.

B. Next, NSS argues that the Sixth Circuit's collateral-estoppel holding was correct, and that certiorari should be denied for that reason. *See* Br. in Opp. 14-18. The short answer is that NSS will have plenty of opportunity to make that argument in its brief on the merits; by itself, NSS's argument, even if it were correct, would not constitute a reason to deny review. The fact remains that there is a clear split in the circuits, which needs to be resolved.

Besides, NSS's argument that preclusion would "promot[e] frivolous and unnecessary appeals in cases where a party recognizes that one independent ground for a trial court decision is correct" (*id.* at 15) misses the point. It may be that, when one of two alternative holdings is iron-clad, an appeal on the other issue is practically foreclosed. But any harshness to the losing litigant that may result from granting preclusion in such circumstances is vastly outweighed by the inequity to the litigant having won on not one but two grounds if preclusion is denied. That is particularly so because the losing litigant could easily have avoided its predicament by declining to litigate the case to judgment in the face of an insurmountable obstacle blocking its position. *See* Pet. 16 n.9. For example, if (as NSS implies) the contractual bar in *Coach's Corner* was unassailable on appeal, it was just as

unassailable in the trial court. When NSS nevertheless brought suit, it assumed any risk of forfeiting an appeal on other grounds.

Perhaps there are rare instances in which the iron-clad nature of an alternative ground could not be anticipated in advance — for example, where a trial court resolves a close factual question in a way that is entitled to deference on appeal. But if an alternative holding in that scenario presents special equities, the consequence should not be to throw out the baby with the bath water by denying preclusive effect to *all* alternative holdings. There is sufficient flexibility within the doctrine of collateral estoppel to accommodate such cases on an individual basis.[3] Any exception for such cases would be inapplicable here, however, for NSS does not argue that the unappealable nature of the contractual holding in *Coach's Corner* (which it implies would have made an appeal frivolous) came as a surprise.[4]

NSS's assertion that this case illustrates how "alternative holdings do not necessarily reflect . . . thoughtful consideration" (at 16-18) is equally meritless. NSS's suggestion that the *Coach's Corner* court rendered its Section 605 holding without prior briefing or argument on that point is simply wrong. *See supra*, pp. 1-3. And any suggestion that the alternative holdings of courts of first instance are less thoroughly considered than those of appellate courts is nothing short of offensive to the dedication and ability of the Nation's

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[3] *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-34 (1979) (collateral estoppel may be denied where it would work injustice under the circumstances of the case).

[4] Nor can NSS come within the exception recognized in *Staatsburg Water Co. v. Staatsburg Fire Dist.*, 527 N.E.2d 754, 757 (N.Y. 1988), a case to which the Brief in Opposition points at page 16. In *Staatsburg*, the prior decision occurred in an administrative inquiry that an agency had initiated sua sponte, and that the "losing" litigant therefore could not have avoided.

trial judges. *See* Pet. 17. NSS has no answer to this basic point.

C. NSS does not deny that a circuit split exists, but tries to minimize it by claiming that the anti-preclusion side of the conflict overshadows the pro-preclusion side. Even if that were true, it would of course not diminish the basic fact of the circuit split's existence. Besides, it is not true; NSS's attempt to minimize the conflicting case law (which it characterizes as "dicta" and "outdated") is unconvincing.

As for the Ninth Circuit, NSS does not deny that the court authoritatively held in *In re Westgate-California Corp.*, 642 F.2d 1174 (9th Cir. 1981), that, "[e]ven though the court rests its judgment alternatively upon two or more grounds, the judgment concludes each adjudicated issue that is necessary to support any of the grounds upon which the judgment is rested." *Id.* at 1176 (internal quotation marks omitted). Although NSS argues that *Westgate* antedated the final version of the *Restatement (Second) of Judgments* (1982),[5] its holding continues to bind future Ninth Circuit panels and could be overruled only en banc.[6] And there is no reason to believe that this will happen. To the contrary, the Ninth Circuit followed *Westgate*'s holding *after* the issuance of the *Restatement (Second)*'s final version. *See Bank of Guam v. Wiseman*, No. 87-1799, 1990 WL 140521, at *2 (9th Cir. Sept. 27, 1990) (judgment noted at 914 F.2d 1496 (table)).

NSS is also wrong in suggesting that the D.C. Circuit formulated its position as mere *dictum* in *Yamaha Corp. of America v. United States*, 961 F.2d 245, 255 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 1078 (1993). At issue in

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[5] *Westgate* postdated earlier versions of the *Restatement (Second)* that took the same position as the final version and that were found persuasive by other courts. *See, e.g., Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1167 n.4 (5th Cir. Unit A Dec. 1981).

[6] *See, e.g., Spinelli v. Gaughan*, 12 F.3d 853, 855 n.1 (9th Cir. 1993).

Yamaha was the preclusive effect of an alternative ground in the decision of a federal district court in California, to which the D.C. district court had given preclusive effect. *See id.* at 250, 252. On appeal, Yamaha made two arguments: (1) that the D.C. district court should not have given preclusive effect to an alternative holding; and (2) that, after the D.C. district court issued its decision, the Ninth Circuit had affirmed the California district court's decision on only one ground, thereby retroactively depriving the other of preclusive effect. *See id.* at 255, 257.[7] The D.C. Circuit rejected each, holding (1) that alternative holdings in district court decisions are each entitled to preclusive effect, *see id.* at 255; and (2) that the Ninth Circuit had not expressly limited its affirmance to only one ground, so that the preclusive effect of the California district court's decision had not been eliminated, *see id.* at 255-56. Contrary to NSS's suggestion, the D.C. Circuit never addressed whether the Ninth Circuit's judgment itself was entitled to preclusive effect (which perhaps could have been viewed as an alternative ground for affirmance). Thus, both of its holdings were necessary to the D.C. Circuit's judgment, and neither was *dictum*.[8]

NSS is similarly mistaken in suggesting that the Second Circuit has repudiated Judge Learned Hand's classic pronouncement in *Irving National Bank v. Law*, 10 F.2d 721 (2d Cir. 1926). In its 1986 *Gelb* decision, the Second Circuit reaffirmed *Irving* by citing it for the proposition that "[t]he

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[7] *See, e.g., Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 45 (2d Cir. 1986) ("[I]f an appeal is taken and the appellate court affirms on one ground and disregards the other, there is no collateral estoppel as to the unreviewed ground."), *cert. denied*, 480 U.S. 948 (1987).

[8] *See, e.g., Kalka v. Hawk*, 215 F.3d 90, 95-96 (D.C. Cir. 2000) ("The fact that the case theoretically could have been decided without deciding the . . . question is of no moment. A court's stated and, on its view, necessary basis for deciding does not become dictum because a critic would have decided on another basis.") (internal quotation marks omitted).

general rule in this Circuit is that 'if a court decides a case on two grounds, each is a good estoppel.'" 798 F.2d at 45 (quoting 10 F.2d at 724); *see also Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979). NSS's reliance on *Halpern v. Schwartz*, 426 F.2d 102 (2d Cir. 1970), is misplaced. That decision, which declined to apply preclusion, was later "limited" to the "special circumstances" (involving complex bankruptcy issues) there present. *Gelb*, 798 F.2d at 45 n.6; *see also Winters v. Lavine*, 574 F.2d 46, 67 (2d Cir. 1978) ("[T]he [*Irving*] rule has continuing viability in circumstances divergent from those in *Halpern*."); *Williams v. Ward*, 556 F.2d 1143, 1154 (2d Cir.) (Friendly, J.) ("*Halpern* . . . is not to the contrary" because it was "limited to the facts before us") (internal quotation marks omitted), *cert. dismissed*, 434 U.S. 944 (1977).

Finally, NSS's suggestion (at 21) that the Sixth Circuit did not chart a third course flies in the face of the plain language of the court of appeals' opinion. *See* Pet. App. 13a ("We do hold . . . that where, as in *Coach's Corner*, one ground for the decision is clearly primary and the other only secondary, the secondary ground is not 'necessary to the outcome' for the purposes of issue preclusion."). Nor can NSS persuasively liken the Sixth Circuit's rule to one under which *dicta* are disregarded. *See* Br. in Opp. 21 n.9. If the Sixth Circuit could legitimately have equated "secondary" holdings with *dicta*, it could have side-stepped the entire circuit split. *See* Pet. 16 n.8. The Sixth Circuit's decision plainly contemplates that there is an amorphous set of decisional grounds that constitute neither *dicta* nor "primary holdings," and that these grounds are not entitled to preclusive effect.

II. REVIEW IS REQUIRED IN CONNECTION WITH THE SECTION 605 STANDING ISSUE.

NSS does not dispute that the Section 605 standing issue is sufficiently important to warrant this Court's attention, a proposition that is further cemented by NCTA's brief *amicus curiae*.[9] Nor does NSS deny that granting certiorari on this second issue could assist the Court in resolving the issue-preclusion question discussed above. *See* Pet. 19 n.11. Instead, NSS's opposition is devoted to the merits: it contends that NSS does have standing to enforce the first sentence of Section 605(a). But that contention — more relevant at the merits stage than here — misapprehends Time Warner's claim and misstates the relevant law.

NSS first seeks advantage from the 1988 amendment providing that "the term 'any person aggrieved' shall include" certain persons whose standing was questionable under then-prevailing case law. *See* Br. in Opp. 24. According to NSS, the amendment's intent to broaden standing, together with the term "include," add up to the conclusion that NSS (and apparently anyone else) should be accorded standing. But, as explained in the Petition, courts have always subjected "person

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[9] NSS does argue that the court of appeals' view is not entirely unprecedented, in that a few district courts have "found that plaintiffs with similar claims have standing." Br. in Opp. 26; *see id.* at 27-29. But none of the four district court decisions on which NSS relies supports its position. *Television Signal Corp. v. Chapman*, No. C92-3732, 1993 WL 69179 (N.D. Cal. Mar. 3, 1993), involved a suit by a cable operator against a bar for unlawfully intercepting its cable service — a claim that would also come within petitioner's conception of standing. Similarly, *Joe Hand Promotions, Inc. v. Rennard Street Enterprises, Inc.*, 975 F. Supp. 746 (E.D. Pa. 1997), involved a suit against interceptors of a satellite signal. *See id.* at 751; *see also Joe Hand Promotions, Inc. v. Rennard Street Enters., Inc.*, 954 F. Supp. 1046, 1054-55 (E.D. Pa. 1997). The remaining decisions on which NSS relies did not address standing at all, and are therefore inapposite. *See That's Entertainment, Inc. v. J.P.T., Inc.*, 843 F. Supp. 995 (D. Md. 1993); *Joe Hand Promotions v. D.M.B. Ventures, Inc.*, Nos. CIV. A. 93-2656 & 93-3141, 1995 WL 328399 (E.D. La. May 31, 1995).

aggrieved" statutes to a zone-of-interests limitation. *See* Pet. 21-23. Even if a plaintiff that does not fall within the categories of the "include" clause can have standing, it simply does not logically follow that such a plaintiff automatically satisfies the zone-of-interests limitation. *See* Pet. 25.

NSS (at 24-25) next attributes to the Petition a strawman: that a plaintiff must come within the "include" clause to have standing. In fact, the Petition argues that, even if this is not required, a plaintiff must still satisfy the zone-of-interests test. *See* Pet. 25. NSS also suggests (at 25) that it *can* come within the terms of the "include" clause. But that clause grants standing only where there is an "intercept[ion]." 47 U.S.C. § 605(d)(6). Even assuming that Time Warner was not authorized to provide the programming at issue to the Melody Lane Lounge, there was no interception: Time Warner was in lawful possession of the signal.

Finally, NSS suggests that it does fall within the zone of interests protected by the first sentence of Section 605(a) — on the theory that it "is not a stranger that had only some indirect economic interest," but had an interest in "the content of the boxing event" that was of "significant economic value." Br. in Opp. 25 (internal quotation marks omitted). But the first sentence of Section 605(a) was intended to protect the privacy and integrity of electronic communications — not to shield intellectual-property interests left unprotected by other measures. To have standing, then, a plaintiff must have been injured in some justified expectation of communicative privacy or integrity of its own. NSS therefore cannot predicate standing upon a supposed infringement of its economic interests as a programming licensee — no more than either of the boxers involved in the bout depicted (or, for that matter, their employees or creditors) could make such a claim. Like them, NSS may have suffered injury in fact, but that by itself

is simply not enough to bring NSS within the zone of interests protected by the statute.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[10] NSS also says that Time Warner "apparently disagrees . . . with the fact finding of the courts below that the signals NSS and [Time Warner] received in their respective Ohio facilities both originated from the same initial transmission of the communication." Br. in Opp. 27. Although the residential and the commercial signals originated from a single set of cameras at ringside, the signals diverged at a later point. *See* Pet. App. 3a. NSS does not argue otherwise.